FILED

(1)

81489 MAR 16 1999

OFFICE OF THE CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

WILLIAM BARNES, *et al.*
Petitioners,

v.

THE AMERICAN TOBACCO COMPANY, INC., *et al.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI AND APPENDICES A-D

Attorneys for Appellants:

Dianne M. Nast
Roda & Nast, P.C.
801 Estelle Dr.
Lancaster, PA 17601

Arnold Levin
Craig D. Ginsburg
Levin Fishbein Sedran & Berman
510 Walnut St., Suite 500
Philadelphia, PA 19106

Of Counsel:

Wendell H. Gauthier
Gauthier & Murphy
3500 N. Hullen Street
Metairie, LA 70002

Elizabeth J. Cabraser
Lieff, Cabraser & Heimann
Embarcadero Center West
275 Battery Street, 30th Floor
San Francisco, CA 94111

Stanley M. Chesley
Waite, Schneider, Baalist & Chesley
1513 Central Trust Tower
Cincinnati, OH 45202

Robert L. Redfearn
Simon, Peragine, Smith, & Redfearn, L.L.P.
1100 Poydras Street, 30th Floor
New Orleans, LA 70163

Pel Hughes Printing, Inc., 3801 Toulouse St., New Orleans, LA (504) 486-8646

12768

QUESTION PRESENTED FOR REVIEW

1. Must the Rule 23(b)(3) "predominance" of common issues requirement be satisfied in a class certification under Rule 23(b)(2), which contains no such requirement.

LIST OF PARTIES

The Plaintiffs are:

William Barnes, Ciaran McNally, Catherine Potts, Norma Rodweller, Barbara Salzman, Edward J. Slivak and John Teagle, on behalf of themselves and all others similarly situated.

The Defendants are:

The American Tobacco Company, Inc.; American Brands, Inc.; RJ Reynolds Tobacco Company; RJR Nabisco, Inc.; Brown & Williamson Tobacco Corporation; Batus, inc.; Batus Holdings, Inc.; B.A.T. Industries, P.L.C.; Philip Morris, Inc.; Philip Morris Companies, Inc.; Lorillard Tobacco Company, Inc.; Lorillard, Inc.; Loews Corporation; United states Tobacco Company; UST, Inc.; The Tobacco Institute, Inc.; The Council for Tobacco Research-U.S.A., Inc.; Liggett Group, Inc.; Liggett & Myers, Inc.; Brooke Group, Ltd.; Pennsylvania Distributors Association, Inc.; United Wholesale Tobacco, Candy d/b/a United Vending Service, Inc.; and British American Tobacco Company.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 2

RULES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

I. STANDING OF PETITIONERS TO APPEAL TO THIS COURT 6

II. THE COURT OF APPEALS MISAPPLIED THE CONCEPT OF COHESIVENESS 8

III. THE COURT OF APPEALS IMPROPERLY APPLIED AMCHEM PRODUCTS, INC. V. WINDSOR, 117 S.Ct. 2231 (1997) TO CERTIFICATION OF A RULE 23(b)(2) CLASS ACTION 10

CONCLUSION 15

TABLE OF CONTENTS—continued

APPENDICES:

APPENDIX A–Order of the United States Court of Appeals for the Third Circuit filed December 16, 1998 ..... A-1

APPENDIX B–Judgment of United States Court of Appeals filed November 12, 1998, affirming district court orders decertifying class and granting summary judgment to defendants B-1

APPENDIX C–Opinion of the United States Court of Appeals for the Third Circuit filed November 12, 1998 ..... C-1

APPENDIX D–Memorandum And Order Of United States District Court for the Eastern District of Pennsylvania filed August 22, 1997; and Memorandum on Motion for Reconsideration filed October 17, 1997 decertifying class D-1

APPENDIX E–Order of the United States District Court for the Eastern District of Pennsylvania filed October 17, 1997 ..... E-1

APPENDIX F–Memorandum of the United States District Court for the Eastern District of Pennsylvania filed October 17, 1997 granting summary judgment F-1

APPENDIX G–Order of the United States District Court for the Eastern District of Pennsylvania filed June 3, 1997 ..... G-1

APPENDIX H–Memorandum of the United States District Court for the Eastern District of Pennsylvania filed June 3, 1997 ..... H-1

TABLE OF AUTHORITIES

CASES: PAGE:

Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998) 8

Amchem Products, Inc. v. Windsor, 117 S.Ct. 2231 (1997) 6, 10, 14

Arch v. American Tobacco Co., 175 F.R.D. 469 (E.D.Pa. 1997) 4

Barnes, et al. v. The American Tobacco Company, et al., 161 F. 3d 127 ..... 2, 8

Barnes, et al. v. The American Tobacco Company, et al., 176 F.R.D. 479 ..... 2, 4, 15

Barnes, et al. v. The American Tobacco Company, et al., 984 F. Supp. 842 ..... 2, 4

Bourgeois v. AP Green Industries, Inc., 716 So. 2d 355 (La. 1998) 12

Cimino v. Raymark Industries, 151 F. 3d 297 (5th Cir. 1998) 13

Deposit Guaranty National Bank v. Roper, 445 U.S. 326 (1980) 6

Eubanks v. Billington, 110 F.3d 87 (D.C. Cir. 1997) 8

Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F. 2d 816 (D.C. Cir. 1984) 12, 13, 14

TABLE OF AUTHORITIES—continued

Georgine v. Amchem Products, Inc., 83 F.3d 610 (3d Cir. 1996) 10, 11

Holmes v. Continental Can Co., 706 F.2d 1144 (11th Cir. 1983) 9

Metro-North Commuter RR v. Buckley, 521 U.S. 424 (1997) 12

O'Connor v. Boeing North American, Inc. 1998 U.S. Dist. LEXIS 15433 and 15976 (C.D. Ca. 1998) 12

Potter v. Firestone Tire and Rubber Co., 863 P. 2d 795 (Cal. 1993) 12

Sterling v. Velsicol, 855 F. 2d 1188 (6th Cir. 1988) 13

United States Parole Commission v. Geraghty, 445 U.S. 388 (1980) 6, 7

STATUTES:

28 U.S.C. §1254(1) 2

28 U.S.C. §1291 2

28 U.S.C. §1332 2

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 23 ..... 2, 3, 5, 6, 8-10, 15

No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1999

WILLIAM BARNES, *et al.*
Petitioners,

v.

THE AMERICAN TOBACCO COMPANY, INC., *et al.*
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners William Barnes, Ciaran McNally, Catherine Potts, Norma Rodweller, Barbara Salzman, Edward Slivak, and John Teagle, on behalf of themselves and all others similarly situated, respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Third Circuit issued in the above proceeding on November 12, 1998 and the denial of the petition for rehearing issued on December 16, 1998.

OPINIONS BELOW

The opinion of the Court of Appeals of which review is sought (Appendix C) is reported at 161 F.3d 127 (3d Cir. 1998). That opinion affirmed the orders of the District Court (Appendices D, E, F and G) which are reported at 176 F.R.D. 479 (E.D. Pa. 1997) and 984 F. Supp. 842 (E.D.Pa. 1997). The order denying the petition for rehearing (Appendix A) is not reported.

STATEMENT OF JURISDICTION

This case was originally filed in the Court of Common Pleas of Philadelphia County. Defendants removed the case to the United States District Court for the Eastern District of Pennsylvania. The District Court had jurisdiction under 28 U.S.C. §1332. The Third Circuit Court of Appeals exercised jurisdiction under 28 U.S.C. §1291. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

The Opinion of the United States Court of Appeals for the Third Circuit was filed November 12, 1998. Petitioners requested rehearing, which was denied by an Order of December 16, 1998.

RULES INVOLVED

This case involves Rule 23 of the Federal Rules of Civil Procedure, specifically, subsection 23(b)(2), which provides for certification upon satisfaction of the requirements of Rule 23(a)(1)-(4), where the "party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." This case sought such injunctive and declaratory relief.

Rule 23 (a) and (b)(2), Federal Rules of Civil Procedure, provide as follows:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * *
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as whole; or ....

STATEMENT OF THE CASE

Petitioners, Pennsylvania residents who currently smoke cigarettes, filed this case against respondents, cigarette manufacturers, alleging inter alia that respondents intentionally exposed petitioners to numerous hazardous substances found in their cigarettes. The case was prosecuted by petitioners on behalf of themselves and over one million other, similarly situated Pennsylvania cigarette smokers. Petitioners sought injunctive and declaratory relief in the form of a court-supervised medical monitoring program for the benefit of the class as a whole.

The case was removed to the United States District Court. There petitioners filed an amended complaint and sought class certification. The District Court initially denied class certification by order entered June 3, 1997. Arch v. American Tobacco Co., 175 F.R.D. 469 (E.D.Pa. 1997). In that order, the court found that it might properly certify a medical monitoring claim under Rule 23(b)(2), if the petitioners restructured their case to seek specific relief that could be properly characterized as invoking the court's equitable powers. Petitioners amended the complaint to fall within the description of the class that the court found it might certify, and reasserted their request for class certification under Rule 23(b)(2).

Accordingly, on August 22, 1997, the District Court certified the class under Rule 23(b)(2), limited to the medical monitoring claims. Barnes v. The American Tobacco Co., 176 F.R.D. 479 (E.D.Pa.1997). Respondents filed motions, among them a motion for leave to appeal, several motions for summary judgment, and a motion for reconsideration of the August 22, 1997 order. Shortly before the scheduled trial, the District Court denied the motions for leave to appeal and for reconsideration, but granted some motions for summary judgment, effectively disposing of six of the seven named plaintiffs' claims, and decertified the class pursuant to Fed. R. Civ. P. 23(c)(1), purportedly leaving nothing for trial. Id., Barnes v. The American Tobacco Co., 984 F. Supp. 842 (E.D.Pa. 1997).

The court based its summary judgment rulings on the issue of the named petitioners' personal eligibility for the specific medical monitoring program they had recommended (the Burns Program). Id. at 851. The summary judgment was based on a finding that the claims of William Barnes, Catherine Potts, Norma Rodweller, Barbara Salzman, and Edward Slivak for the benefits provided under the Burns program were barred by the

Pennsylvania statute of limitations. The claim of Ciaran McNally was dismissed on the ground that the only medical monitoring she required under the Burns Program was no different than she would have required had she not been exposed to the dangerous chemicals in cigarettes. The court did not address the claim of John Teagle, which therefore should be deemed to survive.

The class was decertified under Rule 23(c)(1). The court decertified the class in light of the evidentiary development that occurred in discovery and the evidence submitted in support of the parties' respective positions on the motions for summary judgment. The court found that the existence of individual issues (e.g., as to the individual plaintiffs' medical conditions) affected the "cohesiveness" and "homogeneity" required for a Rule 23(b)(2) class. The court found that three "individual issues" impacted cohesiveness: addiction, causation, and affirmative defenses. The trial court apparently determined that the entitlement of the class to the availability of a medical monitoring remedy was destroyed by defendants' evidence that the named plaintiffs (not the class members) were individually ineligible for or unable to benefit from the specific medical monitoring program proposed by the plaintiffs during the pretrial period. Significantly, the trial court did not consider the alternative of appointing additional or substitute class representatives to avoid decertification, and did not provide the named plaintiffs with the opportunity to develop and propose an alternative medical monitoring program.

Petitioners appealed the decertification as well as the summary judgment orders to the Third Circuit Court of Appeals. The Third Circuit affirmed both decisions, holding that the class lacked the "cohesiveness" required for a Rule 23(b)(2) class.

Petitioners' motion for reconsideration was denied. Hence this petition for certiorari was filed.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Third Circuit in this case misapplies and confuses the requirements of cohesiveness and homogeneity in a Rule 23(b)(2) class action, and improperly applies Amchem Products, Inc. v. Windsor, 117 S.Ct. 2231 (1997).

I. STANDING OF PETITIONERS TO APPEAL TO THIS COURT.

Petitioners believe that the Third Circuit erred in granting summary judgment to the Respondents on their claims, but recognize that the grant of summary judgment involves the application of state law, not ordinarily a concern for this Court. However, neither of the courts below made any disposition of the claim of named plaintiff and class representative John Teagle. Accordingly, his standing to seek review of the decertification order is beyond question. Moreover, the overriding federal concern has to do with the application of Rule 23(b)(2) of the Federal Rules of Civil Procedure. Although six of the petitioners were dismissed from the case by the rulings of the courts below, they, as well as John Teagle, are nevertheless appropriate parties to file this petition for certiorari. The doctrines recognized in Deposit Guaranty National Bank v. Roper, 445 U.S. 326 (1980) and United States Parole Commission v. Geraghty, 445 U.S. 388 (1980) establish that, even if a named class representative has lost the stake in the outcome that he or she had in the beginning, the named class representative is eligible to appeal a denial of class certification.

In Roper, the plaintiffs had asked the court to certify a class of persons who had been forced to pay usurious credit card payments. After both class certification and a motion for interlocutory appeal were denied, defendant confessed judgment

for the maximum amount the individual plaintiffs could have recovered. Plaintiffs refused the offer, but the court entered judgment in their favor, over their objection, and dismissed the case. Plaintiffs appealed to the United States Court of Appeals. The court of appeals held that the plaintiffs' appeal was not moot, and reversed the denial of class certification. This Court granted certiorari to consider the ruling of the court of appeals and affirmed, recognizing that the plaintiffs maintained a personal stake in the outcome even after their cases were dismissed. The interest in shifting the costs of litigation to those who would share in the benefits of a class action was adequate to permit all of the named plaintiffs to continue as appellants. Similarly, in Geraghty, the plaintiff was a prisoner aggrieved by what he felt were unfair parole regulations. He was permitted to prosecute his appeal even though he no longer had an interest in the litigation.

Here, the courts below have precluded the entire class of Pennsylvania smokers from seeking a declaration of their right to a court-supervised medical monitoring program, because the named plaintiffs who prosecuted the action were determined, on summary judgment and despite starkly conflicting evidence and issues of fact, to be ineligible to benefit personally. However, the validity of medical monitoring as an holistic class-wide remedy is greater and different than the sum of the named plaintiffs' personal entitlements or eligibility.

There is another reason that the case of named plaintiff and class representative Ciaran McNally is appropriate for this appeal. Ms. McNally's case is "capable of repetition, yet evading review." United States Parole Commission v. Geraghty, 445 U.S. 388, 398 (1980). Unlike the other plaintiffs, under the rationale of the court below Ms. McNally had no claim because she had not been smoking long enough to need any medical monitoring more extensive than that required by non-smokers. Under the rationale of the court, if she continues to smoke (as is

statistically highly likely), her claim for medical monitoring will eventually ripen.

II. THE COURT OF APPEALS MISAPPLIED THE CONCEPT OF COHESIVENESS.

Federal Rule of Civil Procedure 23 recognizes different kinds of class actions for different purposes. All class actions must meet the requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. Indeed, the court below found that the requirements of Rule 23(a) were met, and the Court of Appeals allowed that finding to stand. Barnes v. The American Tobacco Company, 161 F.3d 127, 140 (3d Cir. 1998).

Rule 23(b)(2) allows a case to be maintained as a class action if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Petitioners do not deny that a class certified under Rule 23(b)(2) must be cohesive and homogeneous. Cohesiveness is a judicially implied characteristic of Rule 23(b)(2) classes, which addresses the class-wide nature of the wrongdoing that the plaintiffs have suffered and the class-wide nature of the relief sought. The Rule 23(b)(2) class "is, by its very nature, assumed to be a homogeneous and cohesive group with few conflicting interests among its members." Allison v. Citgo Petroleum Corp., 151 F.3d 402, 413 (5th Cir. 1998) (footnote and citations omitted). The underlying premise of Rule 23 (b)(2) certification is that class members suffer from a common injury that can be addressed by class-wide relief. Eubanks v. Billington, 110 F.3d 87 (D.C. Cir. 1997).

Although the four preliminary requirements of Rule 23(a) will provide a degree of cohesiveness, a class certified

under Rule 23(b)(3) can be heterogeneous. Holmes v. Continental Can Co., 706 F.2d 1144 (11th Cir. 1983). It is this very heterogeneity that has made necessary the notice requirements and the opt-out rights under Rule 23(b)(3).

None of the three "individual issues" (addiction, causation, and affirmative defenses), which the courts below found to militate against cohesiveness, actually create conflicts within the class. At issue is the availability of medical monitoring relief for the benefit of all in the class who are determined, under the protocol approved by the court, to be eligible for the program. The opportunity to apply for eligibility and benefit was the class-wide remedy to which all in the class were entitled, in which all had an interest, and as to which none had a conflict. The courts erroneously foreclosed this benefit on grounds that an individual eligibility determination might be adverse to some class members. The courts below therefore denied all class members the class-wide remedy, because some individuals in the class might not qualify for its benefits.

The Third Circuit erroneously extended and distorted the concept of cohesiveness by engrafting Rule 23(b)(3) requirements onto a Rule 23(b)(2) class. The lower court determined that the existence of these "individual issues" goes to a "predominance" inquiry, but predominance is not and never has been a Rule 23(b)(2) requirement. The drafters required "predominance" of common issues of law or fact in Rule 23(b)(3); predominance was not included or required in Rule 23(b)(2).

As a result of the Third Circuit's decision, the clear, distinct line between the Rule 23(b)(2) class and the Rule 23(b)(3) class has been obliterated. The intervention of this Court is required to reinforce the important difference between these two classes, as Rule 23's design and structure clearly provide.

III. THE COURT OF APPEALS IMPROPERLY APPLIED AMCHEM PRODUCTS, INC. V. WINDSOR, 117 S.Ct. 2231 (1997) TO CERTIFICATION OF A RULE 23(b)(2) CLASS ACTION.

The court below relied heavily on Georgine v. Amchem Products, Inc., 83 F.3d 610 (3d Cir. 1996), aff'd sub nom Amchem Products, Inc. v. Windsor, 117 S.Ct. 2231 (1997) in support of its affirmance of class decertification. But Amchem has little relevance to a medical monitoring class action sounding in equity under Rule 23(b)(2). The settlement class in Amchem failed to meet the requirements of Rule 23(a) as well as the requirements of Rule 23(b)(3).

This Court in Amchem took pains to separate and differentiate the characteristics of, and requests for certification under, Rule 23(b)(3). The class in Amchem failed to meet the requirements of either Rule 23(a) or Rule 23(b)(3).

The Third Circuit, however, misapplied Amchem to effectively foreclose class certification whenever products cause harm or injury to humans. The Third Circuit twice quoted this Court's adoption of its observation in Georgine v. Amchem Products, Inc., 83 F.3d 610 (3d Cir. 1996) that:

> Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma—a disease which, despite a latency period of approximately fifteen to forty years, generally kills its victims within two years after they

> become symptomatic. Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.

Id. at 626.

This analysis simply does not apply to this case, which seeks no money damages for personal injury, but rather seeks medical monitoring for the class-wide, increased risk of contracting the diseases that the medical community attributes conclusively to smoking cigarettes.[1] An equitable claim for medical monitoring relief is distinct and severable from a damage claim for personal injury. In a medical monitoring case, causation is a class-wide issue and the common and class defining exposure (here to cigarettes) establishes the cohesiveness of the class.

---

[1] Moreover, an illustration of how asbestos exposure differs from cigarette exposure can be seen with the typical asbestos exposure history of Milton Horowitz, who was awarded a judgment in the San Francisco County Superior Court arising out of his exposure to asbestos through use of the Kent Micronite Filter. In addition to his exposure to Kent cigarettes, he spent thirteen days aboard a troop ship in poor condition with asbestos containing steam pipes that vibrated, releasing asbestos fibers. Between 1954 and 1956 and again between 1966 and 1968 he worked in an office building near a construction site at which asbestos-containing materials were used. He was exposed to asbestos in 1987 or 1988 when asbestos-containing ducts were removed from his home. This is but one example of how asbestos exposure can vary. Petitioners, however, were exposed to the carcinogens in cigarettes in only one way, by smoking cigarettes. Unlike Mr. Horowitz's situation, exposure to cigarette carcinogens can be conveniently measured by the "pack year" method. The "different products," different time, different ways, and different period" rationale is meaningless when applied to cigarettes.

The Third Circuit's opinion is in direct conflict with that of other federal courts on the crucial delineation between the legal and factual issues raised by a personal injury claim and those relevant to a claim for medical monitoring. The most influential federal appellate decision in the field of medical monitoring is Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F. 2d 816 (D.C. Cir. 1984).[2] At issue in a personal injury case is, first, whether the plaintiff has suffered a personal injury; and, then, whether that injury is the proximate or legal result of defendant's fault. By contrast, as Friends for All Children and the cases that follow it make clear, medical monitoring does not depend upon proof of personal injury, but upon proof of the need for medical screening, because of a risk of potential injury resulting from defendant's conduct or product. Friends for All Children, 746 F. 2d at 826; Potter v. Firestone Tire and Rubber Co., 863 P. 2d 795 (Cal. 1993); O'Connor v. Boeing North American, Inc. 1998 U.S. Dist. LEXIS 15433 and 15976 (C.D. Ca. 1998).

---

[2] Friends for All Children affirmed the district court's summary judgment granting preliminary injunctive relief in the form of court-supervised pretrial payments for medical monitoring. As the Louisiana Supreme Court recently observed in Bourgeois v. AP Green Industries, Inc., 716 So. 2d 355, 359 (La. 1998), the Friends for All Children decision "provided the dominant framework within which a majority of state supreme courts faced with this issue have since authorized recovery for medical monitoring in the absence of physical injury." In Bourgeois, the Louisiana Supreme Court specifically recognized the distinct remedy of "the establishment of a judicially administrated fund to cover the costs of periodic medical monitoring." 716 So. 2d at 357, distinguishing this equitable remedy from the lump-sum monitoring damages claim rejected under FELA by this Court in Metro-North Commuter RR v. Buckley, 521 U.S. 424 (1997). Id.

This is a distinction with an enormous, indeed dispositive, difference in the realm of class certification. Not only the District of Columbia Circuit in Friends for All Children, but also the Sixth Circuit in Sterling v. Velsicol, 855 F. 2d 1188, 1200-01 (6th Cir. 1988) and the Fifth Circuit in Cimino v. Raymark Industries, 151 F. 3d 297 (5th Cir. 1998)[3] have acknowledged the clear line that divides causation between general causation issues (e.g., a product or substance's characteristics and its ability to cause an enhanced risk of harm), which is subject to class-wide adjudication, and issues of individual causation (did a substance or product cause injury to a specific individual), which may be more appropriate for separate, individualized adjudication in personal injury suits.

In this case, the Third Circuit has erroneously imported Rule 23(b)(3) considerations, which might be appropriate in the context of mass personal injury claims, into a class-wide equitable claim for medical monitoring relief: a claim that would be subject to substantive proof on a class-wide basis, under principles of general causation, utilizing expert testimony, medical and scientific evidence, and other data that relate to the entire population exposed to the product at issue. Indeed, the instant

---

[3] Cimino affirmed a Phase I class-wide trial of several thousand asbestos injury claims which decided: (1) which, if any, of each of the multiple defendants products were defective as marketed and unreasonably dangerous; (2) when each defendant knew or should have known plaintiffs were at risk; (3) whether each defendant was guilty of gross negligence in marketing its products; and (4) as to each defendant so liable, the imposition of a punitive damages multiplier prior to the determination of compensatory damages for the individual class members. 151 F. 3d at 301. Cimino reversed the district court's attempt to avoid individualized follow-up trials of the injury claims arising from the Phase I verdict. Id. at 311-321.

action is more clear-cut than many other cases for medical monitoring, because there is no question as to exposure: the class is self-defined by reference to exposure to the harmful substances in the cigarettes each class member smoked.[4] The greatest problem with trying to place this round peg in the square Amchem hole arises out of the failure of the Third Circuit in this case to recall the fundamental failure of the Amchem class, the want of unity among the various groups of claimants. The most serious problem with the Amchem class arose out of the serious, irreconcilable conflicts among claimants. The interests of the current damage claimants were at variance with those of the future claimants. The interests of those with consortium or

---

[4] In Friends for All Children the D.C. Circuit posed the following hypothetical situation to illustrate the difference between proximate cause in the medical monitoring context and injury causation: Jones is knocked down by a motorbike that Smith is riding through a red light. Jones lands on his head with some force. Understandably shaken, Jones enters a hospital where doctors recommend that he undergo a battery of tests to determine whether he has suffered any internal head injuries. The tests prove negative, but Jones sues Smith solely for the cost of the diagnostic examination, which turns out to be substantial. 746 F. 2d at 825. In this example, Jones, through the fault of Smith, incurred the need for specific medical services, the cost of which is neither inconsequential nor of a kind which one generally expects to incur as part of the wear and tear of daily life. Under these circumstances, Jones reasonably ought to be able to recover the cost of the various diagnostic examinations even if such tests reveal no physical injury. Id. In this case, the District Court in decertifying the class, and the Third Circuit in affirming it, stood medical monitoring law on its head, in conflict with other federal circuits, by presuming to make individual proof of physical injury a predicate to medical monitoring, thereby ignoring the crucial diagnostic function of medical monitoring and its established status as a stand-alone remedy.

family member claims were not protected. Even within the class of currently injured persons, interests varied. The groups could not be sorted out and identified, much less adequately represented in the single settlement.

Here, by contrast, the proposed class action treats all class members equally. Each class member is awarded access to medical monitoring benefits and nothing else. The law of a single state, Pennsylvania, applies to the entire class. If a class member is discovered to have a disease and wants compensation for it, the class member may and must file an individual lawsuit. In this class action, there is no remedy for, or foreclosure of, future claims for individual damages. Barnes v. The American Tobacco Co., 176 F.R.D. 479, 484-86 (E.D. Pa. 1997).

Petitioners have no quarrel with the requirement that the Rule 23(b)(2) class be cohesive. But cohesiveness must mean cohesiveness, not predominance, and not superiority. The cohesiveness requirement is not license to import Rule 23(b)(3) issues into a Rule 23(b)(2) case.

CONCLUSION

Although the Third Circuit committed a number of errors in this case, the error that only this Court can correct is the misapplication of the "cohesiveness" requirement implicit in Rule 23(b)(2). As Amchem observed, Rule 23 provides for three distinct types of class actions, each with its own unique and self-contained requirements. Past efforts to amend the Rule to revise or eliminate these self-contained subsections have failed, and the Rule cannot be permitted to disintegrate by judicial gloss or imprecision into an amalgam of 23(b)(2) and 23(b)(3) issues.

The guidance of this Court is essential to clarify that "cohesiveness" under Rule 23(b)(2) is not expanded to mean "predominance."

Respectfully submitted,

Dianne M. Nast Roda & Nast, P.C.
801 Estelle Drive
Lancaster, PA 17601

Arnold Levin
Craig D. Ginsburg
Levin Fishbein Sedran & Berman
510 Walnut St., Suite 500
Philadelphia, PA 19106

OF COUNSEL:

Wendell H. Gauthier
Gauthier & Murphy
3500 N. Hullen Street
Metairie, LA 70002

Stanley M. Chesley
Waite, Schneider, Baalist & Chesley
1513 Central Trust Tower
Cincinnati, OH 45202

Elizabeth J. Cabraser
Lieff, Cabraser & Heimann
Embarcadero Center West
275 Battery Street, 30th Floor
San Francisco, CA 94111

Robert L. Redfearn
Simon, Peragine, Smith, & Redfearn, L.L.P.
1100 Poydras Street, 30th Floor
New Orleans, LA 70163

March 15, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 97-1844

WILLIAM BARNES; CIARAN McNALLY;
CATHERINE POTTS; NORMA RODWELLER;
BARBARA SALZMAN; EDWARD SLIVAK;
JOHN TEAGLE, ON BEHALF OF THEMSELVES
AND ALL OTHER SIMILARLY SITUATED

v.

THE AMERICAN TOBACCO COMPANY;
AMERICAN BRANDS, INC.;R.J. REYNOLDS TOBACCO
COMPANY; RJR NABISCO, INC.; BATUS, INC.;
BATUS HOLDINGS, INC.; B.A.T. INDUSTRIES, P.L.C.;
PHILIP MORRIS, INC.; PHILIP MORRIS COMPANIES,
INC.; LORILLARD TOBACCO COMPANY, INC.;
LORILLARD, INC.; LOEWS CORPORATION;
UNITED STATES TOBACCO COMPANY; UST, INC.;
THE TOBACCO INSTITUTE, INC.; THE COUNCIL FOR
TOBACCO RESEARCH-U.S.A., INC.; LIGGETT GROUP,
INC.; LIGGETT & MYERS, INC.; BROOKE GROUP,
LTD.; PENNSYLVANIA DISTRIBUTORS ASSOCIATION,
INC.; UNITED WHOLESALE TOBACCO AND CANDY,
d/b/a UNITED VENDING SERVICE, INC.;
BRITISH AMERICAN TOBACCO COMPANY

William Barnes, Ciaran McNally, Catherine Potts,
Norma Rodweller, Barbara Salzman and Edward Slivak, on
behalf of themselves and all those similarly situated,
Appellants

(D.C. Civ. No. 96-cv-05903)

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge,
SLOVITER, STAPLETON, MANSMANN, GREENBERG,
SCIRICA, NYGAARD, ALITO, ROTH, LEWIS,
McKEE and RENDELL, Circuit Judges,

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

Dated: December 16, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 97-1844

WILLIAM BARNES; CIARAN McNALLY;
CATHERINE POTTS; NORMA RODWELLER;
BARBARA SALZMAN; EDWARD SLIVAK;
JOHN TEAGLE, ON BEHALF OF THEMSELVES
AND ALL OTHER SIMILARLY SITUATED

v.

THE AMERICAN TOBACCO COMPANY;
AMERICAN BRANDS, INC.;R.J. REYNOLDS TOBACCO
COMPANY; RJR NABISCO, INC.; BATUS, INC.;
BATUS HOLDINGS, INC.; B.A.T. INDUSTRIES, P.L.C.;
PHILIP MORRIS, INC.; PHILIP MORRIS COMPANIES,
INC.; LORILLARD TOBACCO COMPANY, INC.;
LORILLARD, INC.; LOEWS CORPORATION;
UNITED STATES TOBACCO COMPANY; UST, INC.;
THE TOBACCO INSTITUTE, INC.; THE COUNCIL FOR
TOBACCO RESEARCH-U.S.A., INC.; LIGGETT GROUP,
INC.; LIGGETT & MYERS, INC.; BROOKE GROUP,
LTD.; PENNSYLVANIA DISTRIBUTORS ASSOCIATION,
INC.; UNITED WHOLESALE TOBACCO AND CANDY,
d/b/a UNITED VENDING SERVICE, INC.;
BRITISH AMERICAN TOBACCO COMPANY

William Barnes, Ciaran McNally, Catherine Potts,
Norma Rodweller, Barbara Salzman and Edward Slivak, on
behalf of themselves and all those similarly situated,
Appellants
On Appeal from the United States District Court for the
Eastern District of Pennsylvania
(D.C. Civ. No. 96-cv-05903)

Present: SCIRICA, NYGAARD, and SEITZ, Circuit Judges,

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on June 4, 1998.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered October 17, 1997, be and the same is hereby affirmed. Costs taxed against appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

Clerk

Dated: November 12, 1998

William BARNES; Ciaran McNally; Catherine Potts; Norma Rodweller; Barbara Salzman; Edward Slivak; John Teagle, on Behalf of Themselves and all others Similarly Situated

v.

THE AMERICAN TOBACCO COMPANY; American Brands, Inc.; R.J. Reynolds Tobacco Company; RJR Nabisco, Inc.; Brown & Williamson Tobacco Corporation; Batus, Inc.; Batus Holdings, Inc.; B.A.T. Industries, P.L.C.; Philip Morris, Inc.; Philip Morris Companies, Inc.; Lorillard Tobacco Company, Inc.; Lorillard, Inc.; Loews Corporation; United States Tobacco Company; UST, Inc.; The Tobacco Institute, Inc.; The Council For Tobacco Research-U.S.A., Inc.;Liggett Group, Inc.; Liggett & Myers, Inc.; Brooke Group, LTD.; Pennsylvania Distributors Association, Inc.; United Wholesale Tobacco and Candy, d/b/a United Vending Service, Inc.; British American Tobacco Company William Barnes, Ciaran McNally, Catherine Potts, Norma Rodweller, Barbara Salzman and Edward Slivak, on behalf of themselves and all those similarly situated,

Appellants.

No. 97-1844.

United States Court of Appeals, Third Circuit.

Argued June 4, 1998.

Robert J. LaRocca, (Argued)
Ryan, Brown, McDonnell, Berger & Gibbons
1600 Market Street, Suite 3850
Philadelphia, Pennsylvania 19103

Arnold Levin (Argued)
Levin, Fishbein, Sedran & Berman,
510 Walnut Street, Suite 500
Philadelphia, Pennsylvania 19106

Dianne M. Nast
Roda & Nast
801 Estelle Drive
Lancaster, Pennsylvania 17601;

Julia W. McInerny
Coale, Cooley, Leitz, McInerny & Broadus
818 Conncticut Avenue, N.W., Suite 857
Washington, DC 20006;

Gary R. Fine
Rodham & Fine
633 Southeast Third Avenue, Suite 4R
Fort Lauderdale, Florida 33301

Thomas E. Mellon, Jr.
Mellon, Webster & Mellon
87 North Broad Street
Doylestown, Pennsylvania 18901

Stephen A. Sheller
Sheller, Ludwig & Badey
1528 Walnut Street, 3rd Floor
Philadelphia, Pennsylvania 19102

Attorneys for Appellants.

Hugh R. Whiting
Jones, Day, Reavis & Pogue
901 Lakeside Avenue, North Point
Cleveland, OH 44114

Morton F. Daller
Edward A. Greenberg
Gerhard P. Dietrich
Daller, Greenberg & Dietrich
Valley Green Corporate Center
7111 Valley Green Road Fort
Washington, Pennslyvania 19034
Attorneys for Appellee,
R.J. Reynolds Tobacco Company.

Daniel F. Kolb
Anne B. Howe
Davis, Polk & Wardwell
450 Lexington Avenue
New York, New York 10017

Morton F. Daller
Edward A. Greenberg
Gerhard P. Dietrich
Daller, Greenberg & Dietrich
Valley Green Corporate Center
7111 Valley Green Road
Fort Washington, Pennslyvania 19034
Attorneys for Appellee, RJR Nabisco, Inc.

James L. Griffith
Klett, Lieber, Rooney & Schorling
18th and Arch Streets
Two Logan Square, 12th Floor
Philadelphia, Pennsylvania19103

Virginia L. Hogben
Wolf, Block, Schorr & Solis-Cohen
Packard Building, 12th Floor
Philadelphia, Pennslyvania 19102

Peter S. Greenberg
Schnader, Harrison
1600 Market Street, Suite 3600
Philadelphia, Pennslyvania 19103

Gary R. Long
Shannon L. Spangler
Shook, Hardy & Bacon
One Kansas City Place, 1200 Main Street
Kansas City, MO
Attorneys for Appellee, Brown & Williamson Tobacco Corp.

Robert C. Heim, (argued)
Jeffrey G. Weil
Dechert, Price & Rhoads
4000 Bell Atlantic Tower 1717 Arch Street
Philadelphia, Pennslyvania 19103
Attorneys for Appellees, Philip Morris, Inc. and
Philip Morris Companies, Inc.

William J. O'Brien, Esquire
Howard M. Klein Conrad, O'Brien, Gellman & Rohn
1515 Market Street, 16th Floor
Philadelphia, Pennsylvania 19102

Gary R. Long
Shannon L. Spangler, Shook, Hardy & Bacon
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105
Attorneys for Appellees, Lorillard Tobacco Company, Inc.
and Lorillard, Inc.

William J. O'Brien
Howard M. Klein
Conrad, O'Brien, Gellman & Rohn
1515 Market Street, 16th Floor
Philadelphia, Pennsylvania 19102
Attorneys for Appellee, The Tobacco Institute, Inc.

Patrick W. Kittredge
Gary M. Marek
Kittredge, Donley, Elson, Fullem & Embick
421 Chestnut Street, Fifth Floor
Philadelphia, Pennsylvania 19106
Attorneys for Appellee, The Council for Tobacco Research U.S.A., Inc.

J. Kurt Straub (Argued)
Obermayer, Rebmann, Maxwell & Hippel
One Penn Center, 19th Floor
1627 John F. Kennedy Boulevard
Philadelphia, Pennsylvania 19103
Attorneys for Appellees, Liggett Group, Inc., Liggett & Myers, Inc. and Brooke Group, Ltd.

Before: SCIRICA, NYGAARD and SEITZ, [1] Circuit Judges.

OPINION OF THE COURT

SCIRICA, Circuit Judge.

In this suit against the major American tobacco companies, we must decide whether a medical monitoring class should be certified under Federal Rule of Civil Procedure 23(b)(2). The

---

[1] Judge Seitz heard argument in this matter but was unable to clear the opinion.

District Court decertified a proposed class of cigarette smokers on the grounds that significant individual issues precluded certification. After finding the statute of limitations had run with respect to the claims of five named plaintiffs and the sixth had failed to establish the need for medical monitoring, the District Court granted defendants summary judgment. We will affirm the District Court's decertification order and its grant of summary judgment.

I.
FACTS AND PROCEDURAL HISTORY

Named plaintiffs William Barnes, Catherine Potts, Norma Rodweller, Barbara Salzman, Edward J. Slivak, and Ciaran McNally are Pennsylvania residents who began smoking cigarettes before the age of 15 and have smoked for many years. Plaintiffs filed suit against the defendant tobacco companies [2] in the Court of Common Pleas of Philadelphia County. Defendants removed to the Eastern District of Pennsylvania, and plaintiffs filed an Amended Complaint asserting claims of intentional exposure to a hazardous substance, negligence, and strict prod-

---

[2] The defendants are The American Tobacco Company, Inc.; American Brands, Inc.; R.J. Reynolds Tobacco Company; RJR Nabisco, Inc.; Brown & Williamson Tobacco Corporation; Philip Morris, Inc.; Philip Morris Companies, Inc.; Lorillard Tobacco Company, Inc.; Lorillard, Inc.; United States Tobacco Company; UST, Inc.; The Tobacco Institute, Inc.; The Council for Tobacco Research-U.S.A., Inc.; Liggett Group, Inc.; Liggett & Myers, Inc.; Brooke Group, LTD. Pursuant to the parties' stipulations, American Brands, Inc.; Batus, Inc.; Batus Holdings, Inc., Loews Corporation, and UST, Inc. have been dismissed from this action without prejudice. In addition, B.A.T. Industries p.l.c. was dismissed for lack of personal jurisdiction by order of the District Court dated June 21, 1997.

ucts liability on behalf of a purported class of over one million Pennsylvania cigarette smokers. In their prayer for relief, plaintiffs asked (1) that defendants fund a court-supervised or court approved program providing medical monitoring to class members; (2) for punitive damages to create a fund for common class-wide purposes, including medical research, public education campaigns, and smoking cessation programs; and (3) for other monetary and injunctive relief the court deemed just and proper.

A.

The District Court found the class did not meet the requirements of Rule 23(b)(2) or (b)(3). See Arch v. The American Tobacco Co., 175 F.R.D. 469 (E.D.Pa.1997). The District Court rejected Rule 23(b)(2) certification because plaintiffs had not primarily sought injunctive or equitable relief, finding that "[p]laintiffs' medical monitoring claim is merely a thinly disguised claim for future damages" and that "the overwhelming majority of the relief sought by plaintiffs in their entire complaint is monetary in nature." Id. at 484. The court also found certification improper under Rule 23(b)(3) because issues common to the class did not predominate over plaintiffs' individual issues. In particular, the District Court found individual issues, such as addiction, causation, the need for medical monitoring, and affirmative defenses, made a class action unmanageable and not the superior method for fair and efficient adjudication of the case. Id. at 485-96.

The District Court suggested, however, that plaintiffs' request for a court- supervised program of medical monitoring to detect the latent diseases caused by smoking was the "paradigmatic" request for injunctive relief under a medical monitoring

claim. Id. at 484. Specifically, the court stated:

> The Court finds that it may properly certify a medical monitoring claim under Rule 23(b)(2) when the plaintiffs seek such specific relief which can be properly characterized as invoking the court's equitable powers. See [Day v. NLO, Inc., 144 F.R.D. 330, 336 (S.D.Ohio 1992), rev'd on other grounds, 5 F.3d 154 (6th Cir.1993)]; see also Fried v. Sungard Recovery Serv., Inc., 925 F.Supp. 372 (E.D.Pa.1996). In reaching this decision, the Court perforce rejects defendants' argument that a medical monitoring claim can never be characterized as injunctive.
>
> The dispositive factor that must be assessed to determine whether a medical monitoring claim can be certified as a Rule 23(b)(2) class is-what type of relief do plaintiffs actually seek. If plaintiffs seek relief that is a disguised request for compensatory damages, then the medical monitoring claim can only be characterized as a claim for monetary damages. In contrast, if plaintiffs seek the establishment of a court-supervised medical monitoring program through which the class members will receive periodic medical examinations, then plaintiffs' medical monitoring claims can be properly characterized as claim seeking injunctive relief.

In Day, Judge Spiegel cogently articulates the fine distinction between a medical monitoring claim that seeks monetary relief in the form of compensatory damages and a medical monitoring claim that seeks injunctive relief in the form of a court- supervised medical monitoring program. Judge Spiegel explains:

Relief in the form of medical monitoring may be by a number of means. First, a court may simply order a defendant to pay a plaintiff a certain sum of money. The plaintiff may or may not choose to use that money to have his medical condition monitored. Second, a court may order the defendants to pay the plaintiffs' medical expenses directly so that a plaintiff may be monitored by the physician of his choice. Neither of these forms of relief constitute injunctive relief as required by Rule 23(b)(2).

However, a court may also establish an elaborate medical monitoring program of its own, managed by court-appointed court-supervised trustees, pursuant to which a plaintiff is monitored by particular physicians and the medical data produced is utilized for group studies. In this situation, a defendant, of course, would finance the program as well as being required by the Court to address issues as they develop during the program administration. Under these circumstances, the relief constitutes injunctive relief as required by Rule 23(b)(2).

Day, 144 F.R.D. at 335-36; see also Fried, 925 F.Supp. at 374 (implying that under medical monitoring case law, a creation of a medical monitoring program would be equitable in nature). Based on Judge Spiegel's insightful distinction, it is apparent that relief requested under a medical monitoring claim can be either injunctive or equitable in nature.

To determine whether the named plaintiffs in this case seek equitable relief under their medical monitoring claim, plaintiffs' specific request for relief under this claim must be closely scrutinized. Plaintiffs seek the establishment of a court-supervised program through which class members would undergo periodic medical

> examinations in order to promote the early detection of diseases caused by smoking. This portion of plaintiffs' request is the paradigmatic request for injunctive relief under a medical monitoring claim.

Arch at 483-84.

Accordingly, the District Court granted plaintiffs leave to file an amended complaint. In their Second Amended Complaint, plaintiffs brought only one claim against defendants—medical monitoring.[3] Moreover, plaintiffs eliminated all requests for smoking cessation programs, medical treatment programs, punitive damages, and restitutional damages; the only relief they sought was a court-supervised fund that would pay for medical examinations designed to detect latent diseases caused by smoking. Plaintiffs sought certification under Rule 23(b)(2) for "[a]ll current residents of Pennsylvania who are cigarette smokers as of December 1, 1996 [the day the amended complaint was filed in federal court] and who began smoking before age 19, while they were residents of Pennsylvania." The Second Amended Complaint alleged that plaintiffs and other class members had been exposed to proven hazardous substances through the intentional or negligent actions of the defendants and/or through defective products for which defendants are strictly liable. Plaintiffs alleged that as a proximate result of this exposure, they and other class members suffer significantly increased risks of contracting serious latent diseases and therefore need periodic diagnostic medical examinations. Specifically, plaintiffs con-

---

[3] As we will discuss more fully below, the Pennsylvania Supreme Court recognized a cause of action for medical monitoring in Redland Soccer Club, Inc. v. Department of the Army, 548 Pa. 178, 696 A.2d 137 (Pa.1997).

tended that classwide expert evidence would prove that: (1) when cigarettes are used as defendants intended them to be used, the vast majority of those who use cigarettes become addicted and (2) cigarettes are the leading cause in the nation of cardiovascular disease, lung cancer, and chronic obstructive pulmonary disease, due to the exposure of the throat, heart, and lungs to tobacco smoke. Barnes v. The American Tobacco Co., 176 F.R.D. 479, 491 (E.D.Pa.1997).

In support of their claim, plaintiffs asserted the following:

> . defendants have sold annually in Pennsylvania 22.6 billion cigarettes;
> . there are numerous hazardous substances in cigarette smoke;
> . defendants have known of the relationship between cigarettes and diseases but have concealed their research, publicly denied the relationship between cigarettes and disease, and continue to aggressively promote and sell cigarettes;
> . defendants have known for many years of ways to make safer cigarettes but have intentionally chosen not to do so;
> . defendants have known for many years that nicotine is addictive but have publicly denied both the fact that nicotine is addictive and their knowledge of this fact;
> . defendants have intentionally controlled the level of nicotine and other toxic substances in the cigarettes in order to preserve the dependence of smokers on cigarettes;
> . defendants have used additives such as ammonia, as well as designs for which defendants have sought patents, to make cigarettes a 'package' for

> the delivery of nicotine;
> . defendants have intentionally avoided researching or developing cigarettes that would not cause dependence or addiction in those who use them; and
> . defendants have spent millions of dollars each year in advertising and promoting cigarettes and have geared their efforts particularly to teenagers and children through such efforts as the "Joe Camel" advertising campaign because defendants have allegedly known that unless a person begins smoking before the age of twenty, the person is unlikely ever to begin.

Plaintiffs' physician experts designed the monitoring program using objective medical tests and age-graded criteria. They stated that cigarette smoking was the principal cause of lung cancer, cardiovascular disease, and chronic obstructive pulmonary disease, the three diseases to be monitored.

On August 22, 1997, the District Court conditionally certified the class under Rule 23(b)(2). See Barnes v. The American Tobacco Co., 176 F.R.D. at 481-93. The court held:

> Because defendants have been unable to demonstrate at this point in time that this case is beset with individual issues and manageability problems, the Court finds that plaintiffs' proposed case has the cohesiveness to survive as a Rule 23(b)(2) class. Plaintiffs allege that defendants, acting in concert or pursuant to a common design, have engaged in tortious conduct directed toward the entire class as a whole. Whether or not plaintiffs can prove that defendants have acted in concert or pursuant to a common design is not a proper question to be

> resolved in a certification motion, rather this merit-based question must be reserved for later proceedings. See [Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974)]. However, for purposes of the instant issue sub judice, it is highly relevant that plaintiffs have alleged that defendants have acted in concert or pursuant to a common design. It is this allegation of concerted conduct that supports a finding that defendants have acted on grounds generally applicable to all members of plaintiffs' class. Although there may be individual variations with respect to each class members' relationship with the defendants, the common questions of defendants' liability, which are intimately connected with their concerted conduct, support a finding that defendants have acted on grounds generally applicable to all members of the proposed class.

Barnes, 176 F.R.D. at 492-93.

Subsequently, defendants asked the court to certify the class certification order for interlocutory appeal or, in the alternative, to reconsider the order. They also filed motions for summary judgment.[4] The District Court denied defendants'

---

[4] On September 22, 1997, while these motions were pending, defendants moved to enforce the jury demand. On October 10, 1997, the District Court granted the motion for a jury trial. See Barnes v. The American Tobacco Co., 989 F.Supp. 661 (E.D.Pa.1997). In reaching this decision, the District Court applied the two-part test of Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990). In Terry, the Court noted the Seventh Amendment right to a jury is applicable when legal rights are at stake. See id. at 564, 110 S.Ct. 1339. "To determine whether a particular

(continued...)

request to certify or reconsider the class certification order but decertified the class under Rule 23(c)(1).[5] See Barnes at 493-502. After reviewing the summary judgment record, the court held "the individual issue of addiction, which plaintiffs had previ-

---

[4] (continued...)

action will resolve legal rights [the court must] examine both the nature of the issues involved and the remedy sought.... First, [the court must compare] the[ ] action to 18th century actions brought in the courts of England prior to the merger of the courts of law and equity." Id. at 565, 110 S.Ct. 1339 (citation omitted). Second, the court must " 'examine the remedy sought and determine whether it is legal or equitable in nature.' " Id. (citation omitted). In applying part one of the Terry test, the District Court noted that no cause of action for medical monitoring existed in 1791 but determined that "the most analogous cause of action is a negligence action for future medical expenses" which was an action at law. Thus, the District Court concluded, the first line of inquiry "weighs in favor of finding that defendants have a right to a jury trial." Barnes v. The American Tobacco Co., 989 F.Supp. at 664-65. Turning to the second line of inquiry under Terry, the District Court acknowledged the relief sought is equitable but noted plaintiffs could have "just as readily" requested lump sum damages. Plaintiffs' decision to pursue a medical monitoring fund instead of damages, the District Court concluded, should not deprive the defendants of their constitutional right to trial by jury. See id. at 667-68. See Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477-78, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962) ("[T]he constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings."). Plaintiffs appeal this order. Because we will affirm the grant of summary judgment, we need not decide this issue.

[5] An order to certify a class "may be conditional and may be altered or amended before the decision on the merits." Fed.R.Civ.P. 23(c)(1). Under this rule, District Courts are required to reassess their rulings regularly as the case develops. Kuehner v. Heckler, 778 F.2d 152, 163 (3d Cir.1985).

ously represented as playing no part in this case, is still actually part of the present case"; defendants were not barred from asserting affirmative defenses; and these and other elements in the case presented numerous individual issues which "preclude[d] continuing this case as a class action." Id. at 500-02.

Specifically, the court found three individual issues precluded class certification: addiction, causation, and affirmative defenses. First, the court discussed the role of addiction:

> When compelled to discuss the substantive issues in the case on defendants' motion for summary judgment, plaintiffs primarily focused on "addiction" and purported nicotine "manipulation...." As was explained in Arch, whether or not an individual is addicted is a highly individualistic inquiry:
>
> Plaintiffs' own expert Dr. Burns recognizes that the assessment of addiction is an inherently individual inquiry.... Based on this statement, defendants argue that class certification under these circumstances would require a mini- hearing on the merits of each individual's case to determine injury. See Forman v. Data Transfer, Inc., 164 F.R.D. 400, 403 (E.D.Pa.1995). Importantly, the Court finds that nowhere in plaintiffs' voluminous submissions do they actually refute that addiction is an inherently ind ividual inquiry. Instead, plaintiffs offer a solution to this massive problem of proving addiction on an individual basis. Plaintiffs propose that once the general issue as to whether cigarettes can cause addiction is resolved, the issue as to whether each and every class member is addicted can be resolved by having them answer a questionnaire, consisting of six simple questions. Defendants rejoin that this

> questionnaire cannot by itself determine whether a person is nicotine dependent.
>
> The Court finds that even if the questionnaire were used to determine nicotine dependence, defendants would be permitted to cross-examine each and every class member as to their alleged dependence. Plaintiffs admittedly acknowledge that the plan they prop ose would be, at most, a prima facie indication of addiction. Plaintiffs' own experts concede that addiction is necessarily an individual inquiry. To refute plaintiffs' prima facie case, defendants would be permitted to cross-examine each individual about his specific choices, decisions and behavior, and defendants would be entitled to offer expert testimony about each person's specific circumstances and diagnosis.

Barnes, 176 F.R.D. at 500 (citing Arch, 175 F.R.D. at 487-88).

The District Court also found that causation was an individual issue precluding certification. Although plaintiffs had narrowed their theories of liability, the court found their claim for medical monitoring still implicated the same individual issue of causation their First Amended Complaint asserted in negligence, strict liability, and intentional exposure to a hazardous substance. "[I]nstead of completely dropping their claims for negligence, strict liability and intentional exposure to a hazardous substance, plaintiffs merely inserted these theories as the underlying theories of liability for their medical monitoring. Thus, these theories, with their attendant individual issues, are still in this case." Barnes, 176 F.R.D. at 500. The District Court then quoted its June 3, 1997 decision at length:

To succeed on their products liability and negligence claims, plaintiffs will also have to prove "causation," which the Court finds is not capable of determination on a class-wide basis in this case. Resolution of the "general causation" question of whether cigarettes are capable of being addictive "is not common under Rule 23(a)(2)." Kurczi v. Eli Lilly & Co., 160 F.R.D. 667, 677 (N.D.Ohio 1995). Unless it is proven that cigarettes always cause or never cause addiction, "the resolution of the general causation question accomplishes nothing for any individual plaintiff." Id.; see also In re "Agent Orange" Product Liability Litigation, 818 F.2d 145, 165 (2d Cir.1987) (the "relevant question is not whether Agent Orange has the capacity to cause harm," but rather the "highly individualistic" question of whether "it did cause harm and to whom").

* * *

Plaintiffs cannot satisfy the "causation" element of these claims by proving that all cigarettes can potentially cause the user to become addicted. This is a general causation issue. The resolution of this "general causation question" would accomplish nothing for any of the individual plaintiffs. See Kurczi, 160 F.R.D. at 677. Indeed, the jury would still be required to determine for each class member whether he or she is addicted to cigarettes, and, if so, whether defendants (and which defendant) caused that addiction. With respect to causation, the Court finds that this issue is highly individualized and does not lend itself to Rule 23(b)(2) certification.

To establish their strict products liability claim,

> plaintiffs will be required to prove a defect in defendants' products. This inquiry is also highly individualized. Defendants manufactured hundreds of different types of cigarettes over the years and have even made changes within each brand....
>
> Plaintiffs claim that they can prove a common defect on a class-wide basis for all of defendants' products. Plaintiffs argue that all of defendants' products are inherently defective because they contain sufficient levels of nicotine to cause addiction and other hazardous substances. Thus, plaintiffs will attempt to establish a common defect by showing that this combination exists in all of the cigarettes sold by defendants. Nonetheless, the possibility that plaintiffs' common defect theory will fail and that the class will be splintered into various subclasses—creating manageability concerns—"weighs against a finding of predominance of common issues."

Barnes, 176 F.R.D. at 500-01 (citing Arch, 175 F.R.D. at 488-89 (footnotes omitted)). The court concluded, "[b]ecause plaintiffs intend to prove their medical monitoring claim by using the theories of negligence and strict liability, the individual issues, which are implicated by these theories still exist, and thus preclude class certification." Barnes, 176 F.R.D. at 501.

Finally, the court found that affirmative defenses available to the defendants raised individual issues.[6] The court

---

[6] As we discuss below, in its memorandum opinion disposing of defendants' summary judgment motions, the court concluded, over plaintiffs' objections, that certain affirmative defenses (e.g. assumption of risk) are available to the defendants.

explained: "For example, the defense of assumption of risk requires this Court to examine whether each and every plaintiff was subjectively aware of the risk and/or danger.... In determining whether the statute of limitations precludes a plaintiff from suing on his claim, the Court necessarily would have to examine when plaintiff's injury accrued, and whether plaintiff knew or should have known of the injury and its cause. This is clearly an individual issue.... These issues clearly preclude certification." Barnes, 176 F.R.D. at 502.

B.

The District Court also granted defendants' motions for summary judgment, finding the statute of limitations had expired for five of the six named plaintiffs and that the sixth plaintiff had failed to demonstrate a need for medical monitoring. Barnes v. The American Tobacco Co., 984 F.Supp. 842 (E.D.Pa.1997).[7]

Plaintiffs contended their cause of action was governed by the equitable doctrine of laches, not the statute of limitations. But finding the action "both inherently equitable and legal," the District Court held the statute of limitations "should apply to this action because plaintiffs could have brought this action at law or in equity." Barnes, 984 F.Supp. at 855.

---

[7] Defendants also moved for summary judgment on the issue of product identification. In granting summary judgment for all defendants the District Court did not reach this issue. Defendants Liggett Group Inc., Liggett & Myers Inc., and Brooke Group Ltd. joined defendants' joint brief but also ask us to affirm on the additional ground that plaintiffs failed to produce any evidence that exposure to any Liggett cigarette was a substantial factor in causing injury to any of the named plaintiffs. Because we will affirm the District Court's grant of summary judgment to all defendants, we need not reach this issue.

Examining the theories of liability underlying a medical monitoring claim, the District Court applied a two-year statute of limitations. In Redland, the Pennsylvania Supreme Court held a plaintiff must prove defendant's negligence caused his exposure to a proven hazardous substance. For this reason, the District Court predicted the Pennsylvania Supreme Court would apply the two- year statute of limitations for negligence actions to medical monitoring claims. See Barnes, 984 F.Supp. at 856-57 (citing 42 Pa. Cons.Stat. Ann. § 5524). Furthermore, to the extent that plaintiffs base their claims on strict products liability or an intentional tort, a two-year statute of limitations would still apply. See id. at 857.

In deciding when the claim accrued, the court noted that generally, a plaintiff "is under a duty to use all reasonable diligence to be properly informed of the facts and circumstances upon which a potential right of recovery is based and to institute suit within the prescribed statutory period." Pocono Int'l Raceway, Inc. v. Pocono Produce, 503 Pa. 80, 468 A.2d 468, 471 (Pa.1983). A claim under Pennsylvania law accrues at "the occurrence of the final significant event necessary to make the claim suable." Mack Trucks, Inc. v. Bendix-Westinghouse Automotive Air Brake Co., 372 F.2d 18, 20 (3d Cir.1966). The "discovery rule" is, however, a "narrow exception to this general rule," Tohan v. Owens-Corning Fiberglas Corp., 696 A.2d 1195, 1200 n. 4 (Pa.Super. 1997), and tolls the statute of limitations during the "plaintiff's complete inability, due to facts and circumstances not within his control, to discover an injury despite the exercise of due diligence." Kingston Coal Co. v. Felton Mining Co., Inc., 456 Pa.Super. 270, 690 A.2d 284, 288 (1997). Under the discovery rule, the statute of limitations begins to run when the "plaintiff knows, or in the exercise of reasonable diligence should have known, (1) that he has been injured, and (2) that his injury has been caused by another's conduct." Bradley v. Ragheb, 429 Pa.Super. 616, 633 A.2d 192, 194 (1993)

(quoting MacCain v. Montgomery Hosp., 396 Pa.Super. 415, 578 A.2d 970, 972-73 (1990)).

Because a claim under Pennsylvania law accrues at "the occurrence of the final significant event necessary to make the claim suable," Mack Trucks, 372 F.2d at 20, the court found the plaintiffs' medical monitoring cause of action accrued when the plaintiffs were placed at a "significantly increased risk of contracting a serious latent disease." Redland, 696 A.2d at 145. To determine when that event occurred, the court examined plaintiffs' expert testimony. According to the expert testimony, plaintiffs suffered this significantly increased risk when they reached the "twenty pack-year" level.[8] The court found that five of the six plaintiffs were at that level. Thus, the court concluded, without applying the discovery rule, the medical monitoring claims of these five plaintiffs were barred by the two-year statute of limitations. Barnes, 984 F.Supp. at 859-61.

The court found that even applying the discovery rule would not save these five plaintiffs' claims because each "should have known that smoking cigarettes put him or her at a significantly increased risk of contracting a serious latent disease years before they filed the instant lawsuit.... When a Court is asked to apply the discovery rule, the relevant question is whether an ordinary person, exercising reasonable diligence, would have known or should have known of his injury and its cause. In this case, each plaintiff should have known or did know that smoking caused them to be placed at an increased risk of contracting a serious disease." Id. at 862-63.

---

[8] Pack-year" refers to the number of years during which an individual has smoked a pack of cigarettes per day. For example, a person who smokes one pack a day for 10 years has a 10 pack-year history. A person smoking half a pack per day for 10 years has a five pack-year history. Barnes, 984 F.Supp. at 852 n. 6.

Reviewing the evidence, the court concluded that Barnes, Potts, Rodweller, Salzman, and Slivak had all had notice of the dangers of cigarette smoking for more than two years. Id. With respect to the sixth plaintiff, McNally, the court determined that, since she had only been smoking for 11 years, her claim could not have accrued until sometime last year. See Barnes, 984 F.Supp. at 861 n. 14.[9]

C.

But the District Court granted summary judgment against McNally on a different ground, finding she failed to demonstrate a need for medical monitoring. With regard to McNally, the District Court found:

> Under the Burns Program, Ms. McNally is only entitled to participate in the first level of the proposed medical monitoring program. Under the first level, Ms. McNally would be entitled to receive, annually or biannually, a physical examination, cardiovascular risk assessment and an EKG. However, Ms. McNally herself does not seek monitoring in the form of an EKG. (Defs.' Mot. Summ. J. Medical Monitoring Ex. 1 Pls.' Resp. Interrog. 10). Thus, the only monitoring that Ms. McNally seeks, and would be qualified for under the Burns Program, is a

---

[9] Although the District Court applied the Petty-Hyers program's twenty pack-year threshold to determine the date upon which a medical monitoring claim accrued for the other named plaintiffs, it applied the Burns program's ten pack-year threshold to McNally. See Barnes, 984 F.Supp. at 860, 861 n. 14. Because we conclude that McNally has not demonstrated a need for medical monitoring, we do not decide which (if either) pack-year threshold is appropriate.

> physical examination and cardiovascular risk assessment.
>
> * * *
>
> Because annual physical examinations and cardiovascular risk assessment are routinely recommended to all persons in the absence of exposure, the Court finds Ms. McNally can not establish that "the prescribed monitoring regime is different from that normally recommended in the absence of the exposure." [Redland, 696 A.2d at 146].... The substance of this requirement is to ensure that "a plaintiff may recover only if the defendant's wrongful acts increased the plaintiff's incremental risk of incurring the harm produced by the toxic substance enough to warrant a change in the medical monitoring that otherwise would be prescribed for that plaintiff." [Id. at 144 (citation omitted)].
>
> Here, Ms. McNally only seeks monitoring for two tests which would be recommended for her even if she did not smoke. Any increase in Ms. McNally's incremental risk of incurring the harm produced by the allegedly hazardous substances in cigarettes would not warrant a change in the medical monitoring that would be prescribed for her. Indeed, in the absence of exposure, i t would be recommended that she receive the tests she seeks under her medical monitoring claim. Thus, she cannot satisfy the sixth element of Redland.

Barnes, 984 F.Supp. at 871-72.

Plaintiffs appealed from the final judgment.

II.
JURISDICTION AND STANDARD OF REVIEW

The District Court had jurisdiction under 28 U.S.C. § 1332. We exercise jurisdiction under 28 U.S.C. § 1291.

We review the District Court's decision to decertify the class for an abuse of discretion. See Baby Neal v. Casey, 43 F.3d 48, 56 n. 15 (3d Cir.1994). We exercise plenary review of a grant of summary judgment Wicker v. Consol. Rail Corp., 142 F.3d 690, 696 (3d Cir.1998) (citation omitted), and apply the same test as the District Court; namely, we must determine if there is a "genuine issue as to any material fact" and if "the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In so doing, we must view all evidence and draw all inferences therefrom in the light most favorable to the nonmoving party. Wicker, 142 F.3d at 696 (citation omitted).

III.
DISCUSSION

A. Medical Monitoring

The crucial issue is whether plaintiffs' medical monitoring claim requires inquiry into individual issues. We begin by briefly describing the evolution of this cause of action and its elements.[10]

In In re Paoli Railroad Yard PCB Litigation, 916 F.2d 829 (3d Cir.1990) (Paoli I), we predicted the Pennsylvania Supreme Court would recognize a cause of action for medical monitoring.

---

[10] For another discussion of the evolution of the medical monitoring cause of action, see Metro-North R.R. Co. v. Buckley, 521 U.S. 424, 117 S.Ct. 2113, 138 L.Ed.2d 560 (1997).

We reaffirmed that prediction in In re Paoli Railroad Yard PCB Litigation, 35 F.3d 717 (3d Cir.1994) (Paoli II).[11] The issue of medical monitoring first reached the Pennsylvania Supreme Court in Simmons v. Pacor, Inc., 543 Pa. 664, 674 A.2d 232 (Pa.1996), where the unanimous court recognized medical monitoring as a viable cause of action under Pennsylvania law. In Simmons, the court permitted plaintiffs with asbestos-related asymptomatic pleural thickening to recover for medical monitoring. It was not until Redland Soccer Club v. Department of the Army, 548 Pa. 178, 696 A.2d 137 (1997), however, that the Pennsylvania Supreme Court had the opportunity to articulate the specific elements of a claim for medical monitoring. Building on this court's decisions in Paoli I and Paoli II, the Supreme Court found that plaintiffs must prove the following elements:

> (1) exposure greater than normal background levels; (2) to a proven hazardous substance; (3) caused by the defendant's negligence; (4) as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease; (5) a monitoring procedure exists that makes the

---

[11] In Paoli I, we predicted the Pennsylvania Supreme Court would require a party to meet a four-part test to establish a claim for medical monitoring: (1) plaintiff was significantly exposed to a proven hazardous substance through the negligent actions of the defendant; (2) as a proximate result of exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease; (3) that increased risk makes periodic diagnostic medical examinations reasonably necessary; and (4) monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial. Paoli I, 916 F.2d at 852. In Paoli II, we added another element to the claim, holding that a plaintiff had to show that "a reasonable physician would prescribe for her or him a monitoring regime different than the one that would have been prescribed in the absence of that particular exposure." Paoli II, 35 F.3d at 788 (citation omitted).

> early detection of the disease possible; (6) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and (7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles.

Redland, 696 A.2d at 145-46.[12]

The injury in a cause of action for medical monitoring is the "costs of periodic medical examinations necessary to detect the onset of physical harm." Id. at 144; see also Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816, 826 (D.C.Cir.1984) ("It is difficult to dispute that an individual has an interest in avoiding expensive diagnostic examinations just as he or she has an interest in avoiding physical injury."); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 977 (Utah 1993) (citations omitted) ("Although the physical manifestations of an injury may not appear for years, the reality is that many of those exposed have suffered some legal detriment; the exposure itself

---

[12] Other jurisdictions have authorized recovery for medical monitoring in the absence of physical injury. See, e.g., Bourgeois v. A.P. Green Indus., 716 So.2d 355 (La.1998); Potter v. Firestone Tire & Rubber Co., 6 Cal.4th 965, 25 Cal.Rptr.2d 550, 863 P.2d 795 (Cal.1993); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970 (Utah 1993); Ayers v. Township of Jackson, 106 N.J. 557, 525 A.2d 287 (1987). In addition, some federal courts predicting state law have reached the same conclusion. See Cook v. Rockwell Int'l Corp., 755 F.Supp. 1468 (D.Colo.1991); Johnson v. Armstrong Cork Co., 645 F.Supp. 764 (W.D.La.1986). But see Ball v. Joy Technologies, Inc., 958 F.2d 36 (4th Cir.1991) (holding that, under the laws of Virginia and West Virginia, recovery of medical monitoring expenses is only available where a plaintiff has sustained a physical injury); Werlein v. United States, 746 F.Supp. 887 (D.Minn.1990).

and the concomitant need for medical testing constitute the injury."). It is evident that this injury is somewhat different from an injury in a traditional tort, which rests on physical harm. See, e.g., Restatement Second of Torts § 402A (requiring plaintiff to prove in a products liability case "physical harm" which § 7 defines as "physical impairment of the human body"); Simmons, 674 A.2d at 237 (denying plaintiffs recovery other than medical monitoring for asymptomatic pleural thickening because inter alia plaintiffs demonstrated no physical injury). In recognizing medical monitoring as a compensable injury, the Pennsylvania Supreme Court quoted at length from our distinction in Paoli I between a cause of action for increased risk of future harm and a cause of action for medical monitoring. We concluded that a claim for medical monitoring is different from a claim for increased risk of harm because the medical monitoring plaintiff has an identifiable rather than a speculative injury. Id. at 850-51. We explained:

> The injury in an enhanced risk claim is the anticipated harm itself. The injury in a medical monitoring claim is the cost of the medical care that will, one hopes, detect that injury. The former is inherently speculative because courts are forced to anti cipate the probability of future injury. The latter is much less speculative because the issue for the jury is the less conjectural question of whether the plaintiff needs medical surveillance.

Paoli I, 916 F.2d at 851. [13]

---

[13] There is no doubt the costs of medical monitoring are a compensable portion of a plaintiffs' damages when asserted with other injury claims. It appears, however, that allowing plaintiffs to recover in the absence of some injury pushes the limit of the Constitution's case-or-controversy requirement.

In Redland, the court cited four important policy reasons for recognizing a cause of action for medical monitoring. First, medical monitoring promotes "early diagnosis and treatment of disease resulting from exposure to toxic substances caused by a tortfeasor's negligence." Second, "[a]llowing recovery for such expenses avoids the potential injustice of forcing an economically disadvantaged person to pay for expensive diagnostic examinations necessitated by another's negligence," and "affords toxic-tort victims, for whom other sorts of recovery may prove difficult, immediate compensation for medical monitoring needed as a result of exposure." Third, medical monitoring "furthers the deterrent function of the tort system by compelling those who expose others to toxic substances to minimize risks and costs of exposure." Finally, such recovery is "in harmony with 'the important public health interest in fostering access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of disease.' " Id. at 145 (citations omitted).

B. Certification

To be certified, a class must satisfy the prerequisites of Rule 23(a) and the "parties seeking certification must also show that the action is maintainable under Rule 23(b)(1), (2), or (3)." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 117 S.Ct. 2231, 2245, 138 L.Ed.2d 689 (1997). Plaintiffs seek certification under 23(b)(2).

As noted, the District Court conditionally certified the class, stipulating its order could be altered or amended. See Barnes v. The American Tobacco Co., 176 F.R.D. 479 (E.D.Pa.1997); Fed.R.Civ.P. 23(c)(1). Under Rule 23(c)(1), District Courts are required to reassess their class rulings as the case develops. Kuehner v. Heckler, 778 F.2d 152, 163 (3d Cir.1985); see also Richardson v. Byrd, 709 F.2d 1016, 1019

(5th Cir.1983) ("Under Rule 23 the district court is charged with the duty of monitoring its class decisions in light of the evidentiary development of the case. The district judge must define, redefine, subclass, and decertify as appropriate in response to the progression of the case from assertion to facts."). In accordance with 23(c)(1), the District Court examined the evidence adduced for summary judgment purposes and decided to decertify the class. Barnes, 176 F.R.D. at 502.

In considering whether certification is proper, we refrain from conducting a preliminary inquiry into the merits. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) (citation omitted) (" 'In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.' ") At the same time, we must carefully examine the factual and legal allegations. See General Tel. Co. v. Falcon, 457 U.S. 147, 160, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982) ("[S]ometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question."); Coopers & Lybrand v. Livesay, 437 U.S. 463, 469, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978) (citation omitted) ("[T]he class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'").

1. Fed.R.Civ.P. 23(a)

Rule 23(a) presents four requirements: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of represen-

tation.[14] "The requirements of Rule 23(a) are meant to assure both that class action treatment is necessary and efficient and that it is fair to the absentees under the particular circumstances." Baby Neal v. Casey, 43 F.3d 48, 55 (3d Cir.1994). The District Court determined the class satisfied Rule 23(a).

Finding the putative class consisted of more than one million Pennsylvania residents,[15] the court held the class was "so numerous that joinder of all members[is] impracticable." Fed.R.Civ.P. 23(a)(1). Defendants do not dispute that numerosity is satisfied.

The District Court also found plaintiffs satisfied the commonality requirement of Rule 23(a)(2) because they demonstrated there is at least one common question of law or fact. See Baby Neal, 43 F.3d at 56 ("The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact - or law with the grievances of the prospective class."),[16] "For

---

[14] Specifically, Rule 23(a) provides: "One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

[15] In defendants' post-hearing memorandum, defendants place the number of potential class members at 2.8 million.

[16] In Georgine, the court recognized that Baby Neal and other Third Circuit cases "stated a very low threshold for commonality." Georgine v. Amchem Prods. Inc., 83 F.3d 610, 627 (3d Cir.1996). The court noted that the "commonality barrier is higher in a personal injury damages class action, like [Georgine], that seeks to resolve all issues,

(continued)

example, whether defendants have acted in concert or pursuant to a common design is one common question." Arch, 175 F.R.D. at 477.[17]

"The concepts of commonality and typicality are broadly defined and tend to merge." Baby Neal v. Casey, 43 F.3d at 56 (citation omitted). The typicality requirement is designed to align the interests of the class and the class representatives so that the latter will work to benefit the entire class through the pursuit of their own goals. Id. at 57. This requirement does not mandate that all putative class members share identical claims. Id. at 56 (citations omitted). Moreover, "[f]actual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the

---

[16] (continued)

including noncommon issues, of liability and damages." Id. Ultimately, the court did not decide whether that class met the commonality requirement and concluded instead that "the commonality requirement is subsumed by the predominance requirement, which this class cannot conceivably meet." Id. As the District Court noted, in contrast to Georgine, this case is not a personal injury damages class action, nor does it involve a settlement class that was national in scope, where class members are asked to compromise future claims without knowing what those claims might be. Thus, the District Court did not impose a higher commonality requirement. See Arch, 175 F.R.D. at 476-77.

[17] In addition, the District Court found that "whether defendants' actions and omissions in the manufacture, promotion and sale of cigarettes to class members have been sufficiently egregious to warrant the imposition of punitive damages" is also a common question. Arch, 175 F.R.D. at 477. Of course, the plaintiffs have since dropped their demand for punitive damages so this is no longer a common issue.

class members, and if it is based on the same legal theory." 1 Newberg on Class Actions § 3.15, at 3-78; see al so Baby Neal, 43 F.3d at 58 ("[E]ven relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories.").

The District Court found plaintiffs met the typicality requirement. Although defendants had demonstrated there "exist many individualized questions which arise from the factual differences between the putative class members' individual claims, defendants fail[ed] to demonstrate that the 'legal theories of the named plaintiffs potentially conflict with those of the absentees....' " Arch, 175 F.R.D. at 479 (quoting Baby Neal, 43 F.3d at 57). Specifically, the District Court found:

> "Plaintiffs allege that their claims arise from the same course of conduct undertaken by defendants. Specifically, plaintiffs have alleged that defendants have engaged in a concerted course of conduct whereby defendants have concealed their knowledge of n icotine's addictive properties and have purposefully and deliberately emphasized efforts to addict children and adolescents—resulting in an epidemic pediatric disease. In this process, plaintiffs allege that these consumers were involuntar[il]y subject to the cumulative, repetitive assault of the many different carcinogens contained in tobacco smoke. Although plaintiffs' claims may be factually different, plaintiffs have alleged a course of conduct that has given rise to plaintiffs' claims which are ba ed upon the same legal theories, thus satisfying the typicality requirement of Rule 23(a)(3)."

Arch, 175 F.R.D. at 478-79.

Finally, the District Court found that plaintiffs "fairly and adequately protect the interests of the class." Id. at 480 (quoting Fed.R.Civ.P. 23(a)(4)). The adequacy of representation requirement encompasses two distinct inquiries designed to protect the interests of absentee class members. First, it "tests the qualifications of the counsel to represent the class." G.M. Trucks, 55 F.3d at 800. Second, it "serves to uncover conflicts of interest between named parties and the class they seek to represent." Amchem, 117 S.Ct. at 2250.[18]

---

[18] In the District Court, defendants claimed the named plaintiffs were not adequate class representatives because (1) they have split their causes of action and (2) they may have failed to make a knowing and voluntary amendment to their complaint. The District Court found these claims were not "split" or "waived" by the absent class members. In its August 22, 1997 order, the court found: "the Court has already determined that the absent class members cannot bring in this putative class action those claims which have been omitted from the Second Amended Complaint because those claims are not suitable for class action treatment. Consequently, there cannot be any 'splitting' or 'waiver' by these absent class members: there is no other cause of action they can bring, or could have brought, in this action, except possibly the medical monitoring claim set forth in the Second Amended Complaint." 176 F.R.D. at 485. In addition, after reviewing plaintiffs' deposition testimony, the District Court found that the n amed plaintiffs made a knowing and voluntary amendment. The court noted that it is "unrealistic ... to require the named plaintiffs to have an in-depth understanding as to the legal theories behind their claim." Instead, "courts have required the class representatives to actively seek vindication of his or her rights and engage competent counsel to prosecute the claims. In this case, named plaintiffs have actively sought vindication of their rights on a class-wide basis and have engaged competent counsel to litigate their claims." Id. at 486.

2. Fed.R.Civ.P. 23(b)(2)

A class action is maintainable under Rule 23(b)(2) when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed.R.Civ.P. 23(b)(2). Subsection (b)(2) class actions are "limited to those class actions seeking primarily injunctive or corresponding declaratory relief." 1 Newberg on Class Actions § 4.11, at 4-39. The (b)(2) class "serves most frequently as the vehicle for civil rights actions and other institutional reform cases that receive class action treatment." Baby Neal v. Casey, 43 F.3d 48, 58-59 (3d Cir.1994). Indeed, (b)(2) was "designed specifically for civil rights cases seeking broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons." 1 Newberg on Class Actions § 4.11, at 4-39.

As noted, in its June 3, 1997 Order, the District Court found that under certain circumstances medical monitoring could constitute the injunctive relief required by Rule 23(b)(2). Arch, 175 F.R.D. at 483. The District Court initially held that plaintiffs could not be certified under 23(b)(2) because most of the relief they sought was monetary in nature. Arch, 175 F.R.D. at 484. In response to the court's analysis, plaintiffs amended their complaint so it contained only a claim for medical monitoring and asked only for the establishment of a court-supervised medical monitoring program.

Recently, the Supreme Court reexamined the requirements for Rule 23 certification in the context of mass tort class actions. In Amchem Products, Inc. v. Windsor, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), the Supreme Court affirmed our decision in Georgine v. Amchem Products, Inc., 83

F.3d 610 (3d Cir.1996), decertifying a settlement class of claimants exposed to asbestos. As in this case, the issue in Amchem was "whether [the] proposed classes [were] sufficiently cohesive to warrant adjudication by representation." Amchem, 117 S.Ct. at 2249. We found that cohesiveness lacking and the Supreme Court agreed. Quoting Judge Becker's opinion, the Court noted: " 'Class members were exposed to different asbestos- containing products, for different amounts of time, in different ways, and over different periods.... The [exposure-only] plaintiffs especially share little in common, either with each other or with the presently injured class members.... They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories.' " Id. at 2250 (quoting Georgine, 83 F.3d at 626). As we explained, such factual differences "translate into significant legal differences. Differences in amount of exposure and nexus between exposure and injury lead to disparate applications of legal rules, including matters of causation, comparative fault, and the types of damages available to each plaintiff." Georgine, 83 F.3d at 627. We also noted that "individualized issues can become overwhelming in actions involving long-term mass torts (i.e. those which do not arise out of a single accident)." Id. at 628.

While Amchem involved a Rule 23(b)(3) class action, the cohesiveness requirement enunciated by both this court and the Supreme Court extends beyond Rule 23(b)(3) class actions. Indeed, a(b)(2) class may require more cohesiveness than a(b)(3) class. This is so because in a(b)(2) action, unnamed members are bound by the action without the opportunity to opt out.

While 23(b)(2) class actions have no predominance or superiority requirements, it is well established that the class claims must be cohesive. Discussing the requirements for 23(b)(2)

classes in Wetzel v. Liberty Mutual Insurance Company, 508 F.2d 239 (3d Cir.1975), we noted, "[b]y its very nature, a(b)(2) class must be cohesive as to those claims tried in the class action.... Because of the cohesive nature of the class, Rule 23(c)(3) contemplates that all members of the class will be bound. Any resultant unfairness to the members of the class was thought to be outweighed by the purposes behind class actions: eliminating the possibility of repetitious litigation and providing small claimants with a means of obtaining redress for claims too small to justify individual litigation." Id. at 248-49 (citations omitted). In Geraghty v. United States Parole Commission, 719 F.2d 1199, 1205-06 (3d Cir.1983) (citation omitted), we again emphasized that a 23(b)(2) class must be cohesive, noting the District Court has the "discretion to deny certification in Rule 23(b)(2) cases in the presence of 'disparate factual circumstances.' " See also Santiago v. City of Philadelphia, 72 F.R.D. 619, 628 (E.D.Pa.1976) (holding that a "court should be more hesitant in accepting a(b)(2) suit which contains significant individual issues than it should under subsection 23(b)(3)"); Rice v. City of Philadelphia, 66 F.R.D. 17, 20 (E.D.Pa.1974) (holding that a case should not proceed as a(b)(2) action where "virtually all of the issues would have to be litigated individually in order to determine whether a particular alleged class member was entitled to any damages at all").[19]

---

[19] "At base, the (b)(2) class is distinguished from the (b)(3) class by class cohesiveness.... Injuries remedied through (b)(2) actions are really group, as opposed to individual injuries. The members of a(b)(2) class are generally bound together through 'preexisting or continuing legal relationships' or by some significant common trait such as race or gender." Holmes v. Continental Can Company, 706 F.2d 1144, 1155 (11th Cir.1983) (quoting Note, Notice in Rule 23(b)(2) Class Actions for Monetary Relief: Johnson v. General Motors Corp., 128 U.Pa.L.Rev. 1236, 1252-53 (1980) (footnotes omitted)).

In Santiago, the court recognized two reasons why courts must determine whether a proposed (b)(2) class implicates individual issues. First, unnamed members with valid individual claims are bound by the action without the opportunity to withdraw and may be prejudiced by a negative judgment in the class action. "Thus, the court must ensure that significant individual issues do not pervade the entire action because it would be unjust to bind absent class members to a negative decision where the class representatives's claims present different individual issues than the claims of the absent members present." Second, "the suit could become unmanageable and little value would be gained in proceeding as a class action ... if significant individual issues were to arise consistently." Santiago, 72 F.R.D. at 628.

In decertifying the class, the District Court decided that "too many individual issues exist which prevent this case from proceeding as a class action." Barnes, 176 F.R.D. at 500. As noted, the District Court found that addiction, causation, and affirmative defenses all presented individual issues not properly decided in a class action. We believe that addiction, causation, the defenses of comparative and contributory negligence, the need for medical monitoring and the statute of limitations present too many individual issues to permit certification. As in Amchem, plaintiffs were "exposed to different ... products, for different amounts of time, in different ways, and over different periods." See Amchem, 117 S.Ct. at 2250 (citation omitted). These disparate issues make class treatment inappropriate.[20]

---

[20] We note that the individual issues raised by cigarette litigation often preclude class certification. See, e.g., Castano v. The American Tobacco Co., 84 F.3d 734 (5th Cir.1996) (decertifying 23(b)(3) class because individual issues predominated); Smith v. Brown & Williamson Tobacco Corp., 174 F.R.D. 90 (W.D.Mo.1997) (denying

(continued)

a. Nicotine addiction and causation

The District Court found nicotine addiction plays a central role in the case and that addiction is a "highly individualistic inquiry." Barnes, 176 F.R.D. at 500. The District Court noted that when plaintiffs were "compelled to discuss the substantive issues in the case on defendants' motion for summary judgment, [they] primarily focused on 'addiction' and purported nicotine 'manipulation....' " Id. While plaintiffs do not seem to dispute that addiction requires an individual inquiry, they maintain nonetheless that addiction plays no part in the case.

Plaintiffs contend that throughout the litigation, they have

> asserted that defendants' knowledge and intentional misuse of the addictive properties of nicotine—their intentional design of cigarettes to contain a level of nicotine they knew would be addictive—went to their intentional misconduct and liability for designing a defective product. Plaintiffs do not contend

---

[20] (continued)

certification under 23(b)(1), (2) & (3) because of the presence of individual issues); Ruiz v. The American Tobacco Co., 180 F.R.D. 194 (D.Puerto Rico 1998) (denying certification under 23(b)(2) and 23(b)(3) because "cigarette addiction" claims raised too many individual issues). Significantly, no federal appeals court has upheld the certification a class of cigarette smokers or reversed a District Court's refusal to certify such a class. In some state cases, however, plaintiff smokers have succeeded in certification. See Richardson v. Phillip Morris, No. 96145050/CE212596 (Baltimore Cir. Ct. Jan. 28, 1998) (certifying class of Maryland smokers seeking compensatory and punitive damages); R.J. Reynolds Tobacco Co. v. Engle, 672 So.2d 39 (Fla.App. 3 Dist.1996), rev. denied, 682 So.2d 1100 (1996) (certification of state-wide class of tobacco smokers suing for damages caused by smoking).

> that all smokers are addicted, that addiction is a prerequisite to class membership, or that addiction is determinant of a need for medical monitoring. Addiction is a term and concept that is diffi cult to avoid in any smoking case. The documents show that defendants intended and designed cigarettes to be addictive. That they have largely succeeded may be all too apparent. But the addiction of any particular smoker—much less the class as a whole—is simply not an element of plaintiffs' claims.

Brief of Appellant at 41.

We disagree. Addiction remains an essential part of plaintiffs' claim. In order to prevail on their medical monitoring claim—under any of their three theories of liability (negligence, strict products liability, and intentional exposure to a hazardous substance)—plaintiffs must demonstrate that defendants caused their exposure to tobacco. See Redland, 696 A.2d at 145-46. Indeed, plaintiffs' Second Amended Complaint alleges "[p]laintiffs and class members have been significantly exposed to proven haza rdous substances through the intentional or negligent actions of the Defendants, and/or through defective products for which Defendants are strictly liable" and that "[a]s a proximate result of this exposure, Plaintiffs and class members suffer significantly increased risks of contracting serious latent diseases." Second Amended Complaint ¶¶ 20-21.

It is apparent from plaintiffs' Second Amended Complaint as well as their omnibus response to the defendants' joint motions for summary judgment that addiction is the linchpin of causation in this case. According to plaintiffs' complaint, defendants' actions that give rise to liability include the following:

. Defendants have ... known for many years that nicotine is addictive, but have publicly denied both the fact that nicotine is addictive and their knowledge of this fact, in order to conceal the addictive nature of cigarettes from the public, including Pla intiffs and the class....

. During the same time that Defendants have publicly denied the addictive nature of nicotine, Defendants have intentionally controlled the level of nicotine and other toxic substances they have sold, in order to preserve the dependence of smokers on cigarettes that Defendants sell. To this end, Defendants have utilized additives such as ammonia, as well as designs for which Defendants have sought patents, to make cigarettes, in effect, a "package" for the delivery of nicotine. Defendants have intentionally sought to "increase the delivery of nicotine and almost double the nicotine transfer efficiency of cigarettes," maintain "the proper amount of nicotine in tobacco smoke," and "deliver a pharmacologically active dose of nicotine to the smoker."

. During the same period of time, despite this voluntary and public undertaking to protect the public's "health as a basic responsibility paramount to every other consideration," Defendants have also intentionally avoided researching or developing cigarett es that would not cause dependence or addiction in those who use them.

. In their efforts to conceal the health hazards of smoking and the addictive nature of nicotine, Defendants have testified falsely under oath before the United States Congress, provided false explanations

> to customers and governmental entities about the health hazards of tobacco and the harmful qualities of nicotine; concealed their secret research and testing on the dangers of cigarette smoking; [and] concealed their deliberate manipulation of the nicotine levels of cigarettes....

Plaintiffs' Second Amended Complaint ¶¶ 12-14, 16.

Moreover, as the District Court pointed out, in their omnibus response to the defendants' joint motions for summary judgment, plaintiffs focused on addiction and purported nicotine manipulation. Plaintiffs asserted the evidence will establish inter alia that (1) defendants intentionally designed cigarettes to addict smokers; (2) defendants allowed the number of addicted smokers to grow, knowing full well that the smoke caused cancer and lung disease; and (3) defendants intentionally manipulated and cont rolled nicotine levels. As we understand plaintiffs' theory, defendants' actions caused plaintiffs to become addicted to cigarettes and thereby rendered their choice to smoke nonvoluntary.

Plaintiffs suggest that causation can be proved on a class-wide basis, contending they need to show only that smoking cigarettes was a "substantial factor" in "causing" the three diseases to be monitored in the program. See Parks v. Alliedsignal, Inc., 113 F.3d 1327, 1332 (3d Cir.1997) (under Pennsylvania law, a "substantial factor" is legal cause, and requires only proof that a factor is "not merely negligible" in producing a result). Plaintiffs point to the Surgeon General's Reports conclusively determining that cigarette smoking is the major cause of the diseases for which the medical monitoring program was constructed. This evidence, they claim, more than satisfies their burden on the issue of causation.

But plaintiffs cannot prove causation by merely showing that smoking cigarettes causes cancer and other diseases. They must demonstrate that defendants' intentional or negligent nicotine manipulation caused each individual plaintiff to have a significantly increased risk of contracting serious latent diseases thereby demonstrating the need for medical monitoring. Alternatively, under a strict products liability theory, as the District Court found, "each class member will have to establish that the type of cigarettes he or she smoked contained a defect at the time he or she smoked them." Barnes, 176 F.R.D. at 501 (citation omitted). According to plaintiffs, the alleged defect is that defendants intentionally designed these cigarettes to be addictive. But whether defendants caused the injury depends on whether each individual actually is addicted. These are all issues that must be determined on an individual basis.

We note that plaintiffs do not contest the District Court's conclusion that "whether or not an individual is addicted is a highly individualistic inquiry." Barnes, 176 F.R.D. at 500. Instead, plaintiffs suggested to the District Court that once the general issue whether cigarettes can cause addiction is resolved, they could resolve the issue of individual addiction by having each class member answer a questionnaire consisting of six questions.[21] The District Court noted that:

> even if the questionnaire were used to determine nicotine dependence, defendants would be permitted to cross-examine each and every class member

---

[21] On appeal, plaintiffs refer only sparingly to their proposed trial plan. At one point in their brief, however, plaintiffs suggest the District Court erred when it "did not refer or consider plaintiffs' proposed trial plan at all in decertifying the class" because of the many individual issues. But the District Court clearly considered the plan and found it inadequate.

> as to their alleged dependence. Plaintiffs admittedly acknowledge that the plan they propose would be, at most, a prima facie indication of addiction. Plaintiffs' own experts concede that addiction is necessarily an individual inquiry. To refute plaintiffs' prima facie cas e, defendants would be permitted to cross-examine each individual about his specific choices, decisions and behavior, and defendants would be entitled to offer expert testimony about each person's specific circumstances and diagnosis.

Arch, 175 F.R.D. at 488.

Because nicotine addiction must be determined on an individual basis and remains an essential part of plaintiffs' medical monitoring claim, we agree with the District Court that class treatment is inappropriate.

b. The need for medical monitoring

We also believe the requirement that each class member demonstrate the need for medical monitoring precludes certification. In order to state a claim for medical monitoring, each class member must prove that the monitoring program he requires is "different from that normally recommended in the absence of exposure." Redland, 696 A.2d at 146.[22] To satisfy this

---

[22] See also Paoli II, 35 F.3d at 788; Arch, 175 F.R.D. at 490 ("The fact that [Barnes] smokes would not require any additional monitoring for heart disease not already warranted by the multiple, significant risk factors for heart disease he already has."); Hansen v. Mountain Fuel Supply Co., 858 P.2d 970, 979-80 (Utah 1993); Supplemental Declaration of David Burns, M.D. ("Exercise stress testing and an EKG would not normally be recommended for nonsmokers at the ages recommended in the proposed monitoring program, unless they had some other risk factor that placed them at dramatically increased risk of disease.").

requirement, each plaintiff must prove the monitoring program that is prescribed for the general public and the monitoring program that would be prescribed for him. Although the general public's monitoring program can be proved on a classwide basis, an individual's monitoring program by definition cannot. In order to prove the program he requires, a plaintiff must present evidence about his individual smoking history and subject himself to cross-examination by the defendant about that history. This element of the medical monitoring claim therefore raises many individual issues.

c. Defenses

The District Court also held that defenses raise individual issues precluding certification. Over plaintiffs' objection, the District Court found defendants may assert the defenses of contributory negligence, assumption of risk, and consent to exposure to a hazardous substance. Barnes, 984 F.Supp. at 867-69.[23] After reviewing Pennsylvania caselaw, the District Court concluded

> First, legal defenses do not become equitable defenses simply because they are asserted in an action in equity. Second, equitable principles such as the doctrine of unclean hands may not be used to deprive a defendant of legal rights—remedies or defenses. Applying these lessons, the Court finds that defen-

---

[23] Defendants moved for summary judgment against Ciaran McNally, William Barnes, and Catherine Potts on the grounds that their claims were barred by contributory negligence, assumption of risk, and consent to exposure to a hazardous substance. Barnes, 984 F.Supp. at 864. The District Court only considered the defendants' arguments against McNally because it entered summary judgment against Barnes and Potts on statute of limitations grounds.

> dants have a legitimate right to raise the legal defenses of contributory negligence, assumption of risk and consent.

Barnes, 984 F.Supp. at 866. The court noted this suit was not purely equitable but instead "implicates both legal and equitable rights" making it "even less appropriate for [the court] to exercise its equitable powers to bar defendants from asserting its affirmative, legal defenses." Id.

As noted, plaintiffs asserted three theories of liability. They claimed that they were significantly exposed to proven hazardous substances through defendants' intentional actions, negligent actions, and defective products (strict liability). Defendants assert the defenses of consent, comparative negligence, and assumption of risk. Plaintiffs contend that these defenses are not available and that individual issues relating to these defenses should not preclude class certification. Plaintiffs maintain that "comparative negligence" is only available in actions for damages resulting in death or injury, that assumption of risk is not available because the defendants will not be able to show that any plaintiff assumed the risk of the specific defect, and that consent requires a full awareness of defendants' specific conduct and there is no record evidence of such awareness in this case.

The District Court found defendants could raise the defense of comparative negligence, predicting the Pennsylvania Supreme Court would apply Pennsylvania's Comparative Negligence Act[24] rather than contributory negligence to a medical monitoring claim. See Barnes, 984 F.Supp. at 867-68. Although

---

[24] 42 Pa. Cons.Stat. § 7102 provides:

> (a) General rule.—In all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negli-

acknowledging that the Comparative Negligence Act expressly applies to "actions brought to recover damages for negligence resulting in death or injury to person or property," and that plaintiffs seek a court- supervised monitoring program, the District Court found "[t]he application of the Comparative Negligence Act to these claims would more properly advance the goals of the Redland Soccer cou rt, and would also adequately protect the rights of defendants." Barnes, 984 F.Supp. at 867-68. The District Court reasoned that plaintiffs could have requested lump sum damages which would have clearly invoked the Comparative Negligence Act; that plaintiffs asked for equitable relief instead of damages is not dispositive. Furthermore, because Redland expressly encouraged the use of medical monitoring funds, 696 A.2d at 142 n. 6, the District Court predicted the Pennsylvania Supreme Court would not apply the "harsh" and "anachronistic doctrine of contributory negligence" to medical monitoring claims seeking equitable relief. Barnes, 984 F.Supp. at 868.

---

[24] (continued)

gence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

(b) Recovery against joint defendant; contribution.—Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed. The plaintiff may recover the full amount of the allowed recovery from any defendant against whom the plaintiff is not barred from recovery. Any defendant who is so compelled to pay more than his percentage share may seek contribution.

We need not decide whether the Pennsylvania Supreme Court would apply the Comparative Negligence Act to plaintiffs' negligence claim. If the Comparative Negligence Act does not apply, defendants still have the defense of contributory negligence available to them. See Commonwealth Fed. Sav. and Loan Assoc. v. Pettit, 137 Pa.Cmwlth. 523, 586 A.2d 1021, 1026 (Pa.Cmwlth.1991) ("The doctrine of contributory negligence continues to be applicable to situations where both parties are negligent but the resulting injury is not covered under the Pennsylvania Comparative Negligence Act.").[25] Either defense will raise many individual issues.[26]

Under Pennsylvania law, the tort of intentional exposure to hazardous substances is predicated on a theory of battery. See Field v. Philadelphia Elec. Co., 388 Pa.Super. 400, 565 A.2d 1170, 1178 (Pa.Super.1989). Plaintiffs must prove as a constituent element they did not consent to the tortious conduct. See Levenson v. Souser, 384 Pa.Super. 132, 557 A.2d 1081, 1088 (Pa.Super.1989); Prosser & Keeton § 18, at 113 ("Consent avoids recovery simply because it destroys the wrongfulness of the conduct as between the consenting parties, however harmful it might be to the interests of others."); Restatement (Second) Torts § 892A ("One who effectively consents to the conduct of

---

[25] For purposes of our certification inquiry, we need not decide whether these defenses bar plaintiffs' recovery. Instead, we merely conclude that one of these defenses is available to the defendants.

[26] We acknowledge that the existence of affirmative defenses as to some class members may not by itself enough warrant the denial of certification. See Merk v. Jewel Food Stores Div., Jewel Companies, Inc., 702 F.Supp. 1391, 1395 (N.D.Ill.1988); Lorber v. Beebe, 407 F.Supp. 279, 294 (S.D.N.Y.1975). But we note that the defenses are only one of many matters raising individual issues in this case.

another intended to invade his interests cannot recover in an action of tort for the conduct or for the harm resulting from it.") Express consent may be given by words or affirmative conduct and implied consent may be manifested when a person takes no action, indicating an apparent willingness for the conduct to occur. Restatement (Second) Torts § 892 cmt. b & c. The consent must be to the "defendant's conduct, rather than to its consequences." Prosser & Keeton § 18, at 118. A plaintiff's consent is not effective if "the consenting person was mistaken about the nature and quality of the invasion intended by the conduct." Prosser & Keeton § 18, at 114.

Plaintiffs argued in the District Court that the court should use its equitable powers to bar defendants from asserting their affirmative defenses because of defendants' intentional and fraudulent conduct. See Barnes, 984 F.Supp. at 864-65. But the District Court rejected this argument and plaintiffs do not press it on appeal. Instead, plaintiffs argue there is no record evidence they consented to defendants' specific conduct. Defendants maintain plaintiffs knew they were exposing themselves to a hazardous substance yet continued to smoke. There is some evidence on the record, including plaintiffs' own deposition testimony, to support defendants' position that despite warnings, plaintiffs continued to smoke. See id. ("By her own admission, Potts learned 'for sure' that cigarette smoking created an increased risk of disease in 1966, when the Surgeon General's warnings were put on cigarette packages. In addition, and more importantly, Ms. Potts was informed by her cardiologist in the late 1980s that she was at a significantly increased risk of contracting heart disease, in the form of clogged arteries, from smoking.").

Under Pennsylvania law, plaintiffs may recover on a theory of strict liability where a product in a defective condition

unreasonably dangerous to the consumer or user causes harm to the plaintiff. See Spino v. John S. Tilley Ladder Co., 548 Pa. 286, 696 A.2d 1169, 1172 (Pa.1997). Plaintiff must prove the product was defective and the defect was a substantial factor in causing the injury. See id. While a defendant may not assert comparative negligence in a strict products liability action, see Kimco Development Corp. v. Michael D's Carpet Outlets, 536 Pa. 1, 637 A.2d 603, 606- 07 (1993), Pennsylvania courts allow defendants to introduce "evidence of a plaintiff's voluntary assumption of the risk, misuse of a product, or highly reckless conduct ... insofar as it relates to the element of causation." Charlton v. Toyota Indus. Equip., 714 A.2d 1043, 1047 (Pa.Super.1998). To demonstrate that a plaintiff's actions are highly reckless, defendants must show plaintiff "knew or had reason to know of facts which created a high degree of risk of physical harm to himself or that he deliberately proceeded to act, or failed to act, in conscious disregard of that risk." Id. (citation omitted).

Assumption of risk is also available in negligence claims. See Kaplan v. Exxon Corp., 126 F.3d 221, 224-25 (3d Cir.1997).[27] In a negligence action, a defendant is relieved of his duty to protect the plaintiff when the plaintiff was aware of the risk and faced it voluntarily. See Barrett v. Fredavid Builders, Inc., 454 Pa.Super. 162, 685 A.2d 129 (Pa.Super.1996). The defendant must show that the "nature and extent" of the risk were "fully

---

[27] In light of Pennsylvania's adoption of comparative negligence, see 42 Pa. Cons.Stat. Ann. § 7102(a), the existence of the assumption of the risk defense under Pennsylvania law is a matter of some debate. See Kaplan v. Exxon Corp., 126 F.3d 221, 223-25 (3d Cir.1997). In Kaplan, we predicted the Pennsylvania Supreme Court would incorporate assumption of the risk into the duty analysis. Therefore, it is a plaintiff's burden to establish that a defendant has a duty. This issue goes to the jury "unless reasonable minds could not differ." Id. at 225 (citation omitted).

appreciated" and that the plaintiff voluntarily proceeded to face that risk. Childers v. Power Line Equip. Rentals, Inc., 452 Pa.Super. 94, 681 A.2d 201, 208 (1996).

Plaintiffs make essentially the same arguments regarding consent and assumption of risk, contending that because defendants concealed the nature and extent of their conduct, no plaintiff can have consented to or assumed the risks of cigarette smoking. Therefore, consent and assumption of risk present no individual issues and can be resolved on a classwide basis. We are inclined to believe that individual considerations predominate here as well, but recognize that the question is a close one. Therefore we do not rely on the presence of individual issues with the defenses of consent and assumption of risk in reaching our decision to affirm class decertification. But we note other courts have permitted cigarette companies to assert affirmative defenses such as contributory negligence and assumption of risk. See Cipollone v. Liggett Group, Inc., 893 F.2d 541, 559 (3d Cir.1990), aff'd in part, rev'd in part, 505 U.S. 504, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (remanded for jury to consider comparative fault issues); Horton v. The American Tobacco Co., 667 So.2d 1289, 1292 (Miss.1995) (jury considered comparative fault and held that plaintiff was solely responsible for his injury); Gilboy v. The American Tobacco Co., 582 So.2d 1263, 1265 (La.1991) (recognizing assumption of risk defense).[28]

---

[28] But see Wilks v. The American Tobacco Co., 680 So.2d 839, 843 (Miss.1996) ("[We] find that the trial court properly struck the defense of assumption of the risk.... Even if it was a viable defense, it may not be employed unless the defendant admits the existence of a risk. [American Tobacco] firmly denied that smoking was hazardous to one's health.")

d. Statute of Limitations

Finally, we believe that determining whether each class member's claim is barred by the statute of limitations raises individual issues that prevent class certification.[29] It is fundamental that a plaintiff must bring a claim before the applicable statute of limitations expires. Determining whether the statute of limitations has expired necessarily involves determining when it began to run. Under Pennsylvania law, the statute of limitations starts running when the plaintiff's cause of action accrues; a medical monitoring claim accrues when the plaintiff suffers a "significantly increased risk of contracting a serious latent disease." Redland, 696 A.2d at 145. Under plaintiffs' analysis, a cigarette smoker suffers this risk when he reaches the ten or twenty "pack-year" level. A "pack-year" is equivalent to a year in which a person smokes a pack of cigarettes per day. To calculate a particular plaintiff's pack-year history, the court multiplies the number of packs of cigarettes the plaintiff smokes daily by the number of years he has smoked. For example, a person who has smoked a pack of cigarettes each day for twenty years has a twentypack year history; a person who has smoked a half a pack per day for twenty years has a ten pack-year history. Under the pack-year approach to claim accrual, determining when a plaintiff's claim accrued necessitates two individual inquiries for each plaintiff: when he began smoking and how much he has smoked since then. The need to conduct such a determination for each plaintiff augurs that a class action will devolve into a lengthy series of individual trials and therefore

---

[29] We discuss our rationale for applying the statute of limitations rather than laches in affirming the grant of summary judgment against the named plaintiffs. For now, we describe only how the statute of limitations applies to the class.

makes a class action an improper method for resolving these claims.

Because of the individual issues involved in this case—nicotine addiction, causation, the need for medical monitoring, contributory/comparative negligence and the statute of limitations—we believe class treatment is inappropriate.[30]

C. Summary Judgment

Having concluded the District Court did not abuse its discretion in decertifying the class, we now turn to its order granting summary judgment against the six named plaintiffs. The court held the claims of five of the six plaintiffs—Barnes, Potts, Rodweller, Salzman and Slivak—were barred by the statute of limitations. Because each has smoked for over thirty years, the court found they knew long before this suit was filed that smoking cigarettes put them at an increased risk of contracting a serious disease. See Barnes, 984 F.Supp. at 861-63. The court held the sixth plaintiff, Ciaran McNally, was not barred by the statute of limitations because, given her age and smoking history, her claims for monitoring did not accrue more than two

---

[30] In support of certification, plaintiffs point to other medical monitoring claims that have been certified under Rule 23(b)(2) or 23(b)(3). See, e.g., Gibbs v. E.I. DuPont De Nemours & Co., 876 F.Supp. 475 (W.D.N.Y.1995) (exposure to chemicals); Yslava v. Hughes Aircraft Co., 845 F.Supp. 705, 713 (D.Ariz.1993) (class alleging long-term exposure to contaminated ground water certified); Boggs v. Divested Atomic Corp., 141 F.R.D. 58, 67 (S.D.Ohio 1991) (long term exposure to radioactive materials and hazardous waste). Plaintiffs' case, however, presents numerous individual issues not involved in those cases. In addition, the cases plaintiffs cite all involve involuntary exposure to hazardous materials rather than the voluntary exposure involved in this case.

years before this action was brought. Id. at 861 n. 14, 864. But the court held that McNally had no cause of action for medical monitoring because the only monitoring she sought—routine physical examinations and cardiovascular risk assessment—was not different from that normally recommended in the absence of her particular exposure. See id. at 872.

We will briefly set forth the medical and smoking history of the named plaintiffs, as summarized by the District Court:

> Norma Rodweller has high cholesterol and a family history of heart disease. She has been diagnosed with vocal chord polyps and COPD, and has shown abnormalities in pulmonary function tests. She has also been tested for potential coronary insufficiency. She nevertheless continues to smoke despite having been told by doctors that smoking aggravates her medical illnesses. She has also refused her doctor's directions to obtain necessary medical screening such as pap smears and mammograms.
>
> Ciaran McNally is 26 years old. She has been a regular smoker since she was 15 years old and smokes 10-15 cigarettes per day. She received chest x-rays when appropriate in response to symptoms. She has not followed her doctors' advice to quit smoking while taking oral contraceptives.
>
> William Barnes is mildly obese with hypertension and elevated cholesterol. He has a history of coronary artery disease, and he has been diagnosed with hypertensive atherosclerotic heart diseases. He is also a heavy drinker. He has received EKGs, chest x-rays, and pulmonary function testing as appropriate in response to symptoms. He has been told to quit

smoking every time he visited his doctor, and continues to smoke despite evidence of fibrosis of his lung.

Catherine Potts has been diagnosed with COPD, coronary heart disease, angina, hyperlipidemia, and hypertension. She continues to smoke despite being advised by her doctors to cease due to cardiac problems and a potential vocal chord malignancy. She has not followed her doctor's directions for testing, including a recommended colonoscopy following rectal bleeding. On one occasion, she insisted on being discharged from the hospital against medical advice after being diagnosed with possible myocardial infarction. She continues to drink caffeinated beverages despite being advised by doctors to cease doing so.

Edward Slivak has continued smoking despite abnormal pulmonary function tests and abnormal chest x-rays leading to a diagnosis of COPD. He has high blood pressure and elevated cholesterol, has received EKGs, and has been diagnosed with myocardial infarction. Although he has been advised repeatedly not to smoke due to his various medical conditions, he is still smoking.

Barbara Salzman continues to smoke despite having been diagnosed with emphysema and mild to moderate COPD based on pulmonary function tests and chest x-rays She has received chest x-rays, MRI scans, and EKGs in response to her symptoms. She has not, however, mentioned her emphysema to her family physician, explaining that she does not desire

> to followup because "I don't like to look for trouble." She drinks an excessive amount of caffeine and has a family history of heart disease.

Barnes, 984 F.Supp. at 854.

1. Statute of Limitations

Looking to the underlying theories of liability—intentional tort, negligence, and strict products liability—the District Court applied a two-year statute of limitations,finding the claims accrued on the date when the plaintiffs were placed at a "significantly increased risk of contracting a serious latent disease." See Redland, 696 A.2d at 145. Plaintiffs faced this risk when, according to their experts' testimony, they had smoked for twenty pack-years. Rodweller reached this level in 1970, Salzman in 1976, Slivak in 1978, Barnes in 1990, and Potts in 1973. Therefore the court held the claim of each named plaintiff was barred by the statute of limitations. The court also found the discovery rule could not save plaintiffs' claims because each knew or should have known that smoking put him or her at a significantly increased risk of contracting a serious latent disease years before this lawsuit was filed. See Barnes, 984 F.Supp. at 863-64.

Plaintiffs contend the equitable doctrine of laches should apply, arguing their medical monitoring claim is analogous to a suit for nuisance abatement based in equity. Citing Simmons v. Pacor, 543 Pa. 664, 674 A.2d 232 (Pa.1996) and Redland, plaintiffs maintain the Pennsylvania Supreme Court implied it would not apply the statute of limitations to a medical monitoring

claim based on long-term exposure.[31] But we discern no detectable direction from the Pennsylvania Supreme Court that it would apply laches rather than the statute of limitations.

As the District Court found, plaintiffs could have brought their claim at law or in equity depending on the type of relief sought.

> If plaintiffs seek relief that is a disguised request for compensatory damages, then the medical monitoring claim can only be characterized as a claim for monetary damages. In contrast, if plaintiffs seek the establishment of a court-supervised medical monitoring program through which the class members will receive periodic medical examinations, then plaintiffs' medical monitoring claims can properly be characterized as a claim seeking injunctive relief.

Arch, 175 F.R.D. at 483. Plaintiffs themselves apparently believed their claim for medical monitoring seeks a legal remedy since both their original and first amended complaints requested money damages.

---

[31] Plaintiffs point to the following language. In Simmons, the court found that "recovery for medical monitoring is appropriate and just" and that though plaintiffs' experts had recommended medical monitoring, plaintiff had "unfortunately" not sought the relief in the lawsuit. Id. at 240. In Redland, the Court opined that "a medical monitoring trust fund is a more appropriate remedy than lump sum damages in mass exposure toxic tort cases. However, because the Redland Plaintiffs are seeking only a medical monitoring trust fund, we offer no opinion whether lump sum damages are recoverable under HSCA." Redland, 696 A.2d at 142-43 n. 6.

Because plaintiffs could have brought their medical monitoring claim at law or in equity, the statute of limitations, not the doctrine of laches, applies. "[I]t is well established that equity will frequently follow the statute of limitations which controls analogous proceedings at law. This is especially, if not invariably, true if the cause of action is not exclusively cognizable in equity, which is the situation here...." Ebbert v. Plymouth Oil Co., 348 Pa. 129, 34 A.2d 493, 495-96 (Pa.1943). Similarly, in Algrant v. Evergreen Valley Nurseries, Ltd., 126 F.3d 178, 181 (3d Cir.1997) (citations omitted), we stated: "It is settled ... that where legal and equitable claims coexist, equitable remedies will be withheld if an applicable statute of limitati ons bars the concurrent legal remedy." Because plaintiffs could have sought an award of damages, their decision to pursue a claim for a medical monitoring fund instead cannot deprive defendants of the statute of limitations defense. Statutes of limitations are primarily designed to assure fairness and "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." Order of R.R. Telegraphers v. Railway Exp Agency, 321 U.S. 342, 348-49, 64 S.Ct. 582, 88 L.Ed. 788 (1944); see also Carey v. Kerr-McGee Chem. Corp., 999 F.Supp. 1109 (N.D.Ill.1998) (holding medical monitoring claims barred by two year tort statute of limitations).

In predicting what statute of limitations the Pennsylvania Supreme Court would apply, we look to the theories of liability that underlie a medical monitoring claim. Under Redland, a plaintiff must prove that he was exposed to a proven hazardous substance as a result of the defendant's negligence. See Redland,

696 A.2d at 145-46. In Pennsylvania, a two-year statute of limitations applies to negligence actions. See 42 Pa. Cons.Stat. Ann. § 5524. As noted, plaintiffs also allege intentional exposure to a hazardous substance and strict liability for manufacturing a defective product. To the extent that strict products liability or an intentional tort can act as the underlying theory of liability for a medical monitoring claim, the applicable statute of limitations would still be two years. See 42 Pa. Cons.Stat. Ann. § 5524.[32]

Next we must decide when plaintiffs' claims accrued. Generally, a plaintiff "is under a duty to use all reasonable diligence to be properly informed of the facts and circumstances upon which a potential right of recovery is based and to institute suit within the prescribed statutory period." Pocono Int'l Raceway, Inc. v. Pocono Produce, 503 Pa. 80, 468 A.2d 468, 471 (Pa.1983). A claim under Pennsylvania law accrues at "the occurrence of the final significant event necessary to make the claim suable." Mack Trucks, Inc. v. Bendix-Westinghouse Automotive Air Brake Co., 372 F.2d 18, 20 (3d Cir.1966).

A plaintiff's medical monitoring cause of action accrues when he has been placed at a "significantly increased risk of contracting a serious latent disease." Redland, 696 A.2d at 145. To determine when that event occurred, we refer to the testimony of plaintiffs' experts. As the District Court noted, their experts proposed specific dates when plaintiffs would be entitled to participate in the proposed medical monitoring program. Under

---

[32] In Redland, the Pennsylvania Supreme Court held that "medical monitoring" plaintiffs must prove that defendant's negligence caused the exposure. See Redland, 696 A.2d at 146. We assume without deciding that the Pennsylvania Supreme Court would allow an intentional tort or strict products liability to be the underlying theory of liability in a claim for medical monitoring.

the Petty-Hyers Program, a plaintiff would be entitled to medical monitoring when he or she reaches the "twenty pack-year" level.[33]

We agree with the District Court that five of the six named plaintiffs reached that level more than two years ago. Rodweller had been smoking one to one-and-a-half packs since 1953 and became a twenty pack-year smoker in 1970. Salzman had been smoking at least one-and-a-half packs per day for forty-one years and her claim accrued, at the latest, in 1976. Slivak had been smoking at least one to two packs per day for thirty-nine years and his claim accrued, at the latest, in 1978. Barnes had been smoking a pack a day since 1970 and his claim accrued in 1990. Potts had been smoking a pack a day since the early 1950s and her claim accrued no later than 1975.

Absent an exception to the statute of limitations, the medical monitoring claims of these five plaintiffs are timebarred. The "discovery rule" is a "narrow exception to this general rule," Tohan v. Owens-Corning Fiberglas Corp., 696 A.2d 1195, 1200 n. 4 (Pa.Super.1997), and tolls the statute of limitations during the "plaintiff's complete inability, due to facts and circumstances not within his control, to discover an injury despite the exercise of due diligence." Kingston Coal Co. v. Felton Mining Co., 456 Pa.Super. 270, 690 A.2d 284, 288 (1997). Under the discovery rule, the statute of limitations begins to run when the "plaintiff

---

[33] We note that plaintiffs' other expert Dr. Burns proposes that monitoring begin before a person reaches the 20-pack year level. Dr. Burns suggests, for example, that a person who has smoked 15-20 cigarettes for 10 years would be entitled to three of the seven proposed tests. Barnes, 984 F.Supp. at 860. In choosing the 20-pack year level as the accrual date, we, like the District Court, are erring in plaintiffs' favor by choosing a later date.

knows, or in the exercise of reasonable diligence should have known, (1) that he has been injured, and (2) that his injury has been caused by another's conduct." Bradley v. Ragheb, 429 Pa.Super. 616, 633 A.2d 192, 194 (1993). The plaintiff has the burden of proving that he exercised reasonable diligence in bringing his claim. See Cochran v. GAF Corp., 542 Pa. 210, 666 A.2d 245, 249-50 (1995).

We agree with the District Court that the discovery rule does not save the claims of these five plaintiffs. Each plaintiff should have known that cigarettes put him or her at a significantly increased risk of contracting a serious latent disease years before this lawsuit was filed. As the District Court found:

> . "Since the 1980s, every doctor seen by Mr. Barnes for hypertension has told him to stop smoking.... Dr. Brownstein, his doctor in the mid-1980s, took Barnes' cigarettes and threw them away every time Barnes came in for a visit.... Indeed, Mr. Barnes stated that at the time of these visits in the 1980s, he 'kn[e]w that cigarettes are no good for you if you have any type of lung disease.... Further, Mr. Barnes stated that he believed that his father's death from lung cancer was partially caused by smoking.... Finally, Mr. Barnes testified at deposition that none of the warnings on cigarettes, which inform smokers of the risks of smoking, provided him with any information that he already did not possess. Based on these facts, it is obvious Barnes knew that smoking caused him to be placed at an increased risk of contracting a serious latent disease by at least the mid-1980s.' "
>
> . "By her own admission, Potts learned 'for sure' that cigarette smoking created an increased risk of disease in 1966, when the Surgeon General's first

warnings were put on cigarette packages. In addition, and more importantly, Ms. Potts was informed by her cardiologist in the late 1980s that she was at a significantly increased risk of contracting heart disease, in the form of clogged arteries, from smoking."

. "As early as 1959 ... Rodweller was told by a doctor that smoking would put scar tissue on her vocal cords and it was in that year that she realized that 'cigarettes affected [her] body....' Since this time, Ms. Rodweller admits that all of her doctors have advised her to quit smoking because '[i]t can make [her] ill' and because '[she] was a good candidate for emphysema.' "

. "In the 1980s, one of Salzman's doctors told her to stop smoking. The doctor explained, 'it's really bad for you, you can get emphysema, cancer....' In addition to being told by her doctors that she could contract these diseases, Ms. Salzman urged her s on, throughout the 1980s, to quit smoking because of the dangers of smoking."

. "After 1985, Mr. Slivak had read the warnings on the packages of cigarettes.... In addition, in the early 1980s, Slivak discussed with his family that smoking may have been the cause of his wife's cancer. Most importantly, Slivak's doctors connected smoking to his heart disease."

. With respect to plaintiff McNally, the court determined that, since she has only been smoking for approximately 11 years, her claim could not have accrued until sometime last year. FN 14.

Barnes, 984 F.Supp. 861-63 & n. 14.

Plaintiffs argue the claims did not accrue when they were placed "at a significantly increased risk" of developing smoking-related illnesses. They claim instead that the "touchstone of accrual is the suffering of actual, demonstrable injury, not increased risk" and note that Pennsylvania courts have "expressly held that a plaintiff cannot sue for 'increased risk.' " Similarly, they argue the court erred in invoking the discovery rule because there was no injury to discover since none had occurred. These arguments lack merit. If, as plaintiffs maintain, they have suffered no demonstrable injury—or even no injury at all—then we would have to dismiss the case because it lacks an Article III case or controversy. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The Pennsylvania Supreme Court has held that the costs of periodic medical examinations necessary to detect the onset of physical harm, Redland, 696 A.2d at 144, are a compensable injury even in the absence of physical harm. Plaintiffs' argument begs the question of when that injury accrued. Examining plaintiffs' claims, the District Court found the injury accrued when plaintiffs began needing medical monitoring. The District Court determined this date by looking at the testimony of plaintiffs' own experts. We agree with the District Court's analysis.[34]

---

[34] We acknowledge this statute of limitations analysis leads to some "odd conclusions." For instance, with respect to Mr. Barnes' claim, we have held that it accrued in 1990 under the 20 pack-year rule but that he "discovered his injury five years before it accrued, in the mid-1980s when his doctor threw away his cigarettes." But the source of this seeming incongruity is our decision to err in favor of the plaintiffs in calculating the accrual date. In calculating Barnes' accrual date, we used the 20-pack-year level. This is the latest date suggested by plaintiffs.

Citing Page v. United States, 729 F.2d 818 (D.C.Cir.1984) and Fowkes v. Pennsylvania Railroad Co., 264 F.2d 397 (3d Cir.1959), plaintiffs contend the "continuing harm" doctrine should operate to toll the statute of limitations. In Page, the D.C. Circuit found

> It is well-settled that 'when a tort involves continuing injury, the cause of action accrues, and the limitation period begins to run, at the time the tortious conduct ceases.' Since usually no single incident in a continuous chain of tortious activity can 'fairly or realistically be identified as the cause of significant harm,' it seems proper to regard the cumulative effect of the conduct as actionable. Moreover, 'since one should not be allowed to acquire a right to continue the tortious conduct,' it follows logically that statutes of limitations should not run prior to its cessation.

Page at 821-22 (citations omitted). There, the court applied the continuing tort doctrine to a claim by an army veteran that the army subjected him to harmful drugs.

In Fowkes, we found the plaintiff's claim under the Federal Employers' Liability Act was not barred by the three-year statute of limitations under a continuous harm theory. We noted

> 'If the relation is continuous, as in that of master and servant, and the default is likewise continuous until the cumulative effect produces disability in the form of occupational disease, total or partial, the master's failure to perform his duty ... is regarded as a single wrong continuing so long as the employment continues. Such wrong must therefore be redressed by

> action brought within ... (the statutory period) from the time when the employment terminates.'

Fowkes, 264 F.2d at 399 (citation omitted).

In Kichline v. Consolidated Rail Corp., 800 F.2d 356 (3d Cir.1986), however, in declining to apply the continuing harm doctrine to a FELA claim, we limited the applicability of Fowkes. In doing so, we specifically rejected the position now advanced by plaintiffs. We noted that in Fowkes, the "jury found specifically that the plaintiff was unaware that the physical condition for which he sought damages had existed for more than three years before the suit had been filed." Kichline, 800 F.2d at 359. We then stated: "We understand Fowkes to mean that continuing conduct of defendant will not stop the ticking of the limitations clock begun when plaintiff obtained requisite information. On discovering an injury and its cause, a claimant must choose to sue or forego that remedy." Id. at 360.[35] Unlike this case, the discovery rule was not applicable in Fowkes because plaintiff did not know about his injury. But here, as we have discussed, there is unrefuted evidence that plaintiffs knew or should have known about their injury more than two years before filing suit. Under Kichline, the clock began to run when plaintiffs obtained the requisite information.

2. Ciaran McNally

The District Court also granted summary judgment against

---

[35] While plaintiffs are correct that in Kichline we distinguished Page as an "intentional conduct case," Kichline, 800 F.2d at 360, we did not adopt Page as the rule in intentional tort cases. We believe our unequivocal adoption of the discovery rule in Kichline disposes of plaintiffs' argument. We further note that Page, unlike this case, involved involuntary exposure to a hazardous substance.

the sixth named plaintiff, McNally, finding she failed to demonstrate a need for medical monitoring.[36] The District Court found (1) under the Burns Program, McNally is only entitled to participate in the first level of the proposed monitoring program which includes regular physical examinations, cardiovascular risk assessment, and an EKG; (2) McNally only requested cardiovascular risk assessment and annual physical examinations and not EKGs; and (3) annual physical examinations and cardiovascular risk assessment are routinely recommended to all persons even in the absence of exposure. The court concluded that because McNally only seeks monitoring for two tests that would be recommended for her even if she did not smoke, "[a]ny increase in Ms. McNally's incremental risk of incurring the harm produced by the allegedly hazardous substances in cigarettes would not warrant a change in the medical monitoring that would be prescribed for her. Indeed, in the absence of exposure, it would be recommended that she receive the tests she seeks under her medical monitoring claim." Barnes, 984 F.Supp. at 870-72. Therefore, the court reasoned, she cannot satisfy the sixth element of Redland because she cannot establish that "the prescribed regime is different from that normally recommended in the absence of the exposure." See id.[37] We agree with this

---

[36] Before reaching this issue, the District Court concluded defendants were not entitled to summary judgment on the issues of McNally's comparative negligence, assumption of risk, and consent. The District Court found genuine issues of material fact exist with respect to each defense. See Barnes, 984 F.Supp. at 868-70.

[37] The parties' briefs and the record demonstrate a great deal of confusion and disagreement on this issue. The dispute centers around what kind of monitoring program McNally requested and what kind of program plaintiffs' expert recommended for her.

Dr. Burns made contradictory statements with respect to the appro-

(continued)

reasoning and the District Court's decision to grant summary judgment against McNally.

---

[37] (continued)
priate program for McNally. In describing the different levels of monitoring, Dr. Burns recommended three tests for smokers at McNally's level (at least 25 years old and at least 10 years of smoking): (1) an EKG, (2) a cardiovascular risk factor assessment, and (3) a physical examination. But later in his affidavit Dr. Burns specifically stated McNally "should initially receive [cardiovascular risk assessment] and [physical examination]." He did not mention the EKG. Moreover, in plaintiffs' response to defendants' first set of interrogatories, McNally indicated she would only need cardiovascular risk factor assessment and physical examination and did not mention an EKG.

> McNally claims for the first time on appeal that Dr. Burns' report contains a typographical error. She claims paragraph 7 of the report inadvertently stated that only a cardiovascular risk factor assessment and a physical examination would be prescribed for her, and forgot to mention the EKG. She argues this error was "carried through" to the interrogatory and contend the District Court erred by failing to recognize and resolve a resulting "tension" between the interrogatory answer, which neglected to mention the EKG, and the more general statement in Dr. Burns' second report that EKGs should be administered to persons 25 or older who have smoked 10-15 cigarettes per day for 10 years. Defendants claim McNally waived this argument because she did not raise it below. We agree with defendants that this argument is waived.

Alternatively, plaintiffs contend that Dr. Burns, in his expert report, stated that both tests—cardiovascular risk factor coupled with physical examination—were different from that normally prescribed and therefore satisfied the sixth element of Redland. We do not agree with

(continued)

IV.

For the foregoing reasons, we will affirm the judgment of the District Court.

---

[37] (continued)

plaintiffs' analysis of Dr. Burns' testimony. Dr. Burns said: "Cardiovascular risk factor assessment and a physical examination are measures that are recommended for all individuals to identify modifiable causes of heart disease including smoking. They are useful in preventing disease only for those who have an identifiable and modifiable risk factor. All smokers have an identifiable and modifiable risk factor, and the risk of disease increases synergistically when smokers have additional risk factors. Therefore, smokers have a particularly urgent need for this screening in comparison to the general population and will have a potential benefit that is substantially greater than the general population of smokers." Plaintiffs argue this statement supports the position that these tests were different from that normally prescribed for the general population. But as defendants contend, Dr. Burns' report indicates these are "measures recommended for all individuals." We also note Dr. Burns' deposition statement that "most organizations recommended screening for cardiovascular risk factors at almost any interaction with the health care system regardless of age."

William BARNES, et al. v. THE AMERICAN TOBACCO COMPANY, INC., et al.

Civ. A. No. 96-5903.

United States District Court, E.D. Pennsylvania.

Aug. 22, 1997.

Order Denying Certification for Appeal and Reconsideration and Certifying Class
Oct. 17, 1997.

Stephen A. Sheller, Sheller, Ludwig & Badey, Philadelphia, PA, Thomas E. Mellon, Jr., Mellon, Webster & Mellon, Doylestown, PA, Arnold Levin, Jonathan Shub, Levin, Fishbein, Sedran & Berman, Sherrice A. Knisely, Sheller, Ludwig and Badey, Philadelphia, PA, Julia W. McInerny, Coale and Van Susteren, Washington, DC, Gary Robert Fine, Rodham and Fine, P.A., Fort Lauderdale, FL, Dianne M. Nast, Mary Ann M. Cooke, Roda and Nast, P.C., Lancaster, PA, Clifford E. Douglas, Evanston, IL, for Plaintiffs.

Edward F. Mannino, Wolf, Block, Schorr and Solis-Cohen, Peter S. Greenberg, Schnader, Harrison, Segal & Lewis, Philadelphia, PA, Hugh R. Whiting, Jones, Day, Reavis & Pogue, Cleveland, OH, Morton F. Daller, Daller, Greenberg & Dietrich, Tracy Canuso Nugent, Daller, Greenberg and Dietrich, Ft. Washington, PA, Virginia Lynn Hogben, Wolf, Block, Schorr and Solis-Cohen, Judy L. Leone, Dechert, Price & Rhoads, Thomas Finarelli, Lavin, Coleman, O'Neil, Ricci, Finarelli & Gray, Robert C. Heim, Christine C. Levin, Ronni Ellen Fuchs, Dechert, Price & Rhoads, Howard M. Klein, William J. O'Brien, Conrad, O'Brien,

Gellman & Rohn, P.C., Madeline M. Sherry, Stephen J. Imbriglia, Hecker, Brown, Sherry and Johnson, Joseph W. Fullem, Jr., Patrick W. Kittredge, Gary M. Marek, Kittredge, Donley, Elson, Fullem & Embick, Mark E. Squires, J. Kurt Straub, Abrahams, Lowenstein, Bushman & Kauffman, Philadelphia, PA, for Defendants.

Matthew L. Myers, National Ctr. for Tobacco Free Kids, Washington, DC, for the American Heart Association, the American Cancer Society, the American Lung Association, Respondents.

MEMORANDUM

NEWCOMER, District Judge.

Presently before this Court are plaintiffs' Renewed Motion for Certification of Medical Monitoring Class Pursuant to Fed.R.Civ.P. 23(b)(2), and defendants' response thereto, and plaintiffs' reply thereto, and defendants' sur reply thereto, and the plaintiffs' response to defendants' sur reply thereto, and the various exhibits in support of the aforementioned. For the following reasons, the Court grants plaintiffs' motion.

I. Introduction

On June 3, 1997, this Court entered an order and opinion in which plaintiffs' motion for class certification was denied. Arch v. American Tobacco Co., 175 F.R.D. 469 (E.D.Pa.1997). Plaintiffs' motion for class certification sought certification of the First Amended Complaint which contained the following causes of action: (1) medical monitoring; (2) intentional exposure to a hazardous substance; (3) negligence; and (4) strict products liability. Count five of plaintiffs' First Amended Com-

plaint averred that defendants acted in concert or pursuant to a common design.

Plaintiffs sought certification of the following class under the First Amended Complaint:

> All current residents of Pennsylvania who are cigarette smokers as of December 1, 1996, and who began smoking before age 19, while they were residents of Pennsylvania.

Plaintiffs argued that the general requirements of Fed.R.Civ.P. 23(a)(1)- (4) were satisfied and that class certification was proper under Fed.R.Civ.P. 23(b)(3) in the first instance. In addition, plaintiffs contended that their medical monitoring claim could be properly certified under Fed.R.Civ.P. 23(b)(2). Alternatively, plaintiffs sought issue certification under Fed.R.Civ.P. 23(c)(4).

Plaintiffs' motion for certification was denied. Plaintiffs' claims were found not to be certifiable under Rule 23(b)(3) because plaintiffs could not satisfy the superiority and predominance requirements. Additionally, plaintiffs' request for certification of their medical monitoring claim was denied because the majority of relief sought by plaintiffs was predominantly compensatory as opposed to equitable. Finally, the Court denied issue certification under Rule 23(c)(4).

Subsequent to the Court's June 3, 1997 order and opinion, plaintiffs filed a motion for leave to file a Second Amended Complaint, along with a renewed motion for class certification. Plaintiffs' Second Amended Complaint, which plaintiffs were granted leave to file, is significantly different from plaintiffs prior two complaints in this action. In their Second Amended

Complaint, plaintiffs[1] maintain only one claim against the defendants[2]—a claim for medical monitoring. Plaintiffs have discarded their claims sounding in negligence, strict products liability and intentional exposure to a hazardous substance.

In support of their medical monitoring claim, plaintiffs set forth the following facts in their Second Amended Complaint. Plaintiffs allege that defendants manufacture, promote and sell cigarettes. Defendants' earnings on cigarettes sold throughout the United States allegedly exceeded six billion dollars this past year alone, on gross sales of forty-five billion dollars. According to the Pennsylvania Department of Health, more than 22.6 billion cigarettes were sold in Pennsylvania during the fiscal year July 1995 through June 1996.

Plaintiffs allege that cigarettes contain hazardous sub-

---

[1] The plaintiffs named in the Second Amended Complaint are William Barnes, Ciaran McNally, Catherine Potts, Norma Rodweller, Barbara Salzman and Edwark J. Slivak. Steven Arch was granted leave to withdraw from this action and his claims were dismissed without prejudice.

[2] The defendants are The American Tobacco Company, Inc., R.J. Reynolds Tobacco Company, RJR Nabisco, Inc., Brown & Williamson Tobacco Corporation, Philip Morris, Inc., Philip Morris Companies, Inc., Lorillard Tobacco Company, Inc., Lorillard, Inc., United States Tobacco Company, The Tobacco Institute, Inc., The Council for Tobacco Research-U.S.A., Inc., Liggett Group, Inc., Liggett & Myers, Inc. and Brooke Group, Ltd. Pursuant to the respective parties' stipulations, American Brands, Inc., Batus, Inc., Batus Holdings, Inc., Loews Corporation and UST, Inc. have been dismissed from this action without prejudice. In addition, B.A.T. Industries p.l.c. was dismissed for lack of personal jurisdiction by Order of this Court dated June 21, 1997.

stances that cause serious and often fatal diseases of the throat, lungs, and heart, as well as the cardiovascular and pulmonary systems generally, and cause stillbirths and neonatal deaths of babies whose mothers smoke. The hazardous substances include, inter alia, nicotine, carbon monoxide, nitrosamine, formaldehyde, formic acid, acetaldehyde, ammonia, benzene, hydrogen cyanide, and "tar," which are all highly dangerous substances.

Plaintiffs maintain that defendants, acting in concert or pursuant to a common design, have engaged in a wide range of conduct for which they should be held liable to plaintiffs. Defendants allegedly have known of the relationship between cigarettes and disease but have concealed their research, publicly denied the relationship between cigarettes and disease, and continue to aggressively promote and sell cigarettes. In so doing, plaintiffs contend that defendants have engaged in this conduct not only with willful, wanton and reckless disregard for the health of those who use their products, "but have intentionally and deliberately consigned millions of users to disease and death, for no reason other than to maximize [their] profits." (Second Amended Compl. ¶ 12). Further, it is alleged that these defendants have known for many years of ways to make safer cigarettes but have intentionally chosen not to do so.

Defendants have also purportedly known for many years that nicotine is addictive but have publicly denied both the fact that nicotine is addictive and their knowledge of this fact. During the same time that defendants have publicly denied the addictive nature of nicotine, it is alleged that defendants have intentionally controlled the level of nicotine and other toxic substances in the cigarettes in order to preserve the dependence of smokers on cigarettes. Plaintiffs aver that defendants have utilized additives such as ammonia, as well as designs for which defendants have

sought patents, to make cigarettes a "package" for the delivery of nicotine. During this same period of time, plaintiffs allege that defendants have also intentionally avoided researching or developing cigarettes that would not cause dependence or addiction in those who use them.

In order to preserve and increase their sales of cigarettes, and despite their knowledge of the diseases and harm that cigarettes cause, it is alleged that defendants have spent millions of dollars each year in advertising and promoting cigarettes and have geared their efforts particularly to teenagers and children through such efforts as the "Joe Camel" advertising campaign because defendants have allegedly known that unless a person begins smoking before the age of twenty, the person is unlikely to ever begin.

Plaintiffs further allege that in their efforts to conceal the health hazards of smoking and the addictive nature of nicotine, defendants have testified falsely under oath before the United States Congress, provided false explanations to customers and governmental entities about the health hazards of tobacco and the harmful quantities of nicotine, concealed their secret research and testing on the dangers of cigarette smoking, concealed their deliberate manipulation of nicotine levels of cigarettes, required employees, under threat of severe legal sanctions, to keep secret all information that they have learned through their employment about the dangers of cigarette smoking, and concealed documents through devices such as the unwarranted invocation of the attorney client privilege.

In addition, plaintiffs claim that defendants have continued to make false claims to the public, governmental agencies and the United States Congress that they have been making their products as safe as feasible. Plaintiffs assert that these claims are false because defendants allegedly have had the ability, for some

time now, to make safer cigarettes by removing hazardous substances from them such as nitrosamine, ammonia, benzene products and others, yet defendants have failed and intentionally refused to remove these hazardous substances.

Based on the conduct of defendants, plaintiffs contend that defendants are liable to them under their medical monitoring claim. Plaintiffs seek the following relief: (1) certifying this action as a class action pursuant to Fed.R.Civ.P. 23(a) and (b)(2); (2) establishing a Court-supervised program, to be funded by defendants, through which the class members would undergo periodical medical examinations in order to promote the early detection of diseases caused by smoking; and (3) awarding the costs of t his suit and such other relief as the Court deems just and proper.

Plaintiffs seek certification of the following class under the Second Amended Complaint:

> All current residents of Pennsylvania who are cigarette smokers as of December 1, 1996, and who began smoking before age 19, while they were residents of Pennsylvania.

Plaintiffs argue that the general requirements of Fed.R.Civ.P. 23(a)(1)-(4) are satisfied and that class certification is proper under Fed.R.Civ.P. 23(b)(2). Defendants oppose such certification on the grounds that named plaintiffs are inadequate class representatives and that the existence of individual issues make litigating this case as a class action impossible.

II. Discussion

Federal Rule of Civil Procedure 23(c)(1) provides that class certification shall be determined "as soon as practicable after the commencement" of the action. Fed.R.Civ.P. 23(c)(1). A determination of class certification does not focus on whether plaintiffs have stated a cause of action or will prevail on the merits but rather is limited exclusively to whether the requirements of Rule 23 have been satisfied. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178, 94 S.Ct. 2140, 2153, 40 L.Ed.2d 732 (1974); Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 252 (3d Cir.1975): Sala v. National R.R. Passenger Corp., 120 F.R.D. 494, 495 (E.D.Pa.1988). This determination is vested in the sound discretion of the trial court. Gulf Oil Co. v. Bernard, 452 U.S. 89, 100, 101 S.Ct. 2193, 2202, 68 L.Ed.2d 693 (1981); Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 471-72 (5th Cir.1986). Since the court may amend an order granting class certification, In re School Asbestos Litigation, 789 F.2d 996, 1011 (3d Cir.1986), in a close case the court should rule in favor of class certification. Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir.1970).

To obtain class action certification, plaintiffs must establish that all four requisites of Rule 23(a) and that at least one subdivision of Rule 23(b)(2) are satisfied. See Wetzel, 508 F.2d 239.

A. Rule 23(a) Requirements

Rule 23(a) provides that:

> One or more members of the class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of

> law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a)(1)-(4).

The United States Court of Appeals for the Third Circuit has succinctly explained the purposes for which Rule 23(a) was created: "The requirements of Rule 23(a) are meant to assure both that class action treatment is necessary and efficient and that it is fair to the absentees under the particular circumstances." Baby Neal v. Casey, 43 F.3d 48, 55 (3d Cir. 1994). The numerosity requirement addresses the concern of necessity, and the final three requirements are applied in order to determine "whether the class action can be maintained in a fair and efficient manner." Id.

With respect to the Rule 23(a) requirements, plaintiffs simply argue that this Court has previously determined in its opinion of June 3, 1997 that these requirements have been satisfied. Indeed, plaintiffs contend that the findings in the opinion of June 3, 1997 as to Rule 23(a) are the "law of the case" as to the issue sub judice. Defendants do not argue that the requirements of numerosity, typicality and commonality have not been satisfied. In light of the parties' positions, and relying on and incorporating the reasoning from the order and opinion of June 3, 1997, the Court finds that the threshold requirements of numerosity, commonality and typicality have been satisfied for the purposes of the instant motion for class certification.

Although defendants do not contest numerosity, commonality and typicality, defendants do contend that plaintiffs cannot establish adequacy of representation. Specifically, defendants claim that the named plaintiffs are not adequate class

representatives because (1) they have split their causes of action and (2) they may have failed to make a knowing and voluntary amendment. Although defendants' arguments are facially appealing, upon closer review, the Court finds such arguments to be specious.

Pennsylvania law prohibits splitting a single claim into multiple legal actions. Kessler v. Old Guard Mut. Ins. Co., 391 Pa.Super. 175, 182-83, 570 A.2d 569, 573 (1990); Consolidation Coal Co. v. District 5, United Mine Workers of America, 336 Pa.Super. 354, 363, 485 A.2d 1118, 1122 (1984). In addition, failure to join in one action all causes of action which arise from the same transaction or occurrence may result in the waiver of the unmade claims. Hineline v. Stroudsburg Elec. Supply Co., Inc., 402 Pa.Super. 178, 181, 586 A.2d 455, 456, app. denied, 528 Pa. 630, 598 A.2d 284 (1991); Pa.R.Civ.P. 1020(d)(1), (4).

Applying these legal principles, defendants contend that named plaintiffs, with their amendment to the First Amended Complaint, have abandoned many of the legal theories that they brought in their First Amended Complaint. In so doing, defendants argue that the named plaintiffs have patently demonstrated themselves to be inadequate class representatives because they risk waiving potential claims of other class members. Specifically, defendants argue that under the First Amended Complaint, the plaintiffs represented that each and every class member has a present right to treatment and compensatory and punitive damages for the alleged injury of addiction. Defendants contend that plaintiffs have jettisoned that claim and are asking the Court to certify a class for medical monitoring, even if such certification puts at risk the future recovery by class members of treatment for their alleged addiction or the recovery of significant money damages—estimated by plaintiffs to be worth $700,000 for each class member. Defendants assert that plaintiffs should

not be permitted to so disregard class members' interests—especially under Rule 23(b)(2), which does not permit class members the opportunity to opt out and control their own litigation strategies.

Although defendants' argument is facially appealing, the Court finds that named plaintiffs cannot waive or abandon the potential claims of class members. Based on the posture of this case, plaintiffs cannot logically "split" any causes of action belonging to the absent class members. This Court's order and opinion of June 3, 1997 held that none of the claims that defendants allege are being presently split can be maintained on a class-wide basis. Thus, no other claims can be split or waived on behalf of the class if the individual named plaintiffs withdraw the claims on behalf of themselves individually. An individual plaintiff is always free to withdraw his or her own claims; the only issue is whether this conduct prejudices the class.

The situation at bar is roughly analogous to a securities fraud litigation. In securities fraud litigation, the courts often certify the federal claim (such as Section 10(b)(5)) for class action treatment, but decline to certify a companion state law claim for fraud, on the grounds that individual reliance precludes certification on the state law claim. Hence, the status of the action is that while the federal claim is certified, the class representative's state claim is left as an individual, non-class claim. If the class representative thereafter dismisses his or her individual state claim, it cannot prejudice the class members if they seek to pursue their own individual state claims. The state court in which these individuals pursued their fraud claims could not find that the state law claim was waived because it could not have been brought in the prior federal class action.

In this case, the Court has already determined that the absent class members cannot bring in this putative class action

those claims which have been omitted from the Second Amended Complaint because these claims are not suitable for class action treatment. Consequently, there cannot be any "splitting" or "waiver" by these absent class members: there is no other cause of action they can bring, or could have brought, in this action, except possibly the medical monitoring claim set forth in the Second Amended Complaint. The Court thus rejects defendants' argument that named plaintiffs are inadequate class representatives for waiving or abandoning the class members' claims.

The Court also rejects defendants' argument that plaintiffs are inadequate class representatives for failing to make a knowing and voluntary amendment of their complaint. In making this argument, defendants quote snippets of deposition testimony. In particular, defendants cite to the testimony of plaintiff Norma Rodweller to support their position that plaintiffs' amendment may not have been voluntarily or knowingly undertaken. Based mainly on the snippets from Ms. Rodweller's deposition testimony, defendants argue that "it is far from clear that the class representatives knowingly and voluntarily agreed to limit their claims." (Defs.' Opp. Pls.' Renewed Mot. Class Certification at 18).

Upon closer review of the named plaintiffs' deposition testimony, the Court finds that the named plaintiffs have made a knowing and voluntary amendment. If the Court only reviewed the snippets of testimony provided by defendants, it may have concluded that one of the named plaintiffs, namely Ms. Rodweller, did not make a knowing and voluntary amendment of her claims. However, after reviewing all relevant portions of the deposition testimony, it becomes clear that the named plaintiffs made a knowing and voluntary amendment of their claims.

To be sure, the various class representatives articulated the decision to amend the complaint with various degrees of legal

sophistication. However, the applicable case law demonstrates that the class representative's complete understanding of the legal basis for the claims is not required by Rule 23. In re Telectronics Pacing Systems, Inc., 172 F.R.D. 271, 282 (S.D.Ohio 1997) (citing Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 366, 86 S.Ct. 845, 847-48, 15 L.Ed.2d 807 (1966)) (reversing dismissal of class claims where plaintiff "did not understand the complaint at all, ... could not explain the statements made in the complaint [and] ... had a very small degree of knowledge as to what the lawsuit was about...."). The court in In re Telectronics, further recognized:

> [I]t is unrealistic to require a class action representative to have an in- depth grasp of the legal theories of recovery behind his or her claim. It is more important that the representative actively seeks vindication of his or her rights and engages competent counsel to prosecute the claims.

Id. at 282-83 (citation omitted).

Likewise, in this case, it would be unrealistic for this Court to require the named plaintiffs to have an in-depth understanding as to the legal theories behind their claim. If this standard was applied under Rule 23(a)(4), courts would be hard-pressed to find any plaintiff who would qualify as an adequate representative. In lieu of this unrealistic standard, courts have required the class representatives to actively seek vindication of his or her rights and engage competent counsel to prosecute the claims. In this case, named plaintiffs have actively sought vindication of their rights on a class- wide basis and have engaged competent counsel to litigate their claims. Thus, the Court rejects defendants' argument that named plaintiffs are not adequate class representatives.

Disposing of defendants' challenge to adequacy, the Court finds that plaintiffs have demonstrated that the threshold requisites of Rule 23(a)(1)- (4) have been satisfied. Clearing the Rule 23(a) hurdle, plaintiffs must demonstrate that its proposed class satisfies Rule 23(b)(2).

B. Rule 23(b)(2)

Plaintiffs contend that their medical monitoring claim is appropriate for class certification under Rule 23(b)(2). Defendants rejoin that Rule 23(b)(2) certification is not appropriate in this case because the liability phase of plaintiffs' medical monitoring claim raises so many individualized issues that class action treatment in this case would be unmanageable. To resolve the parties' dispute and to determine whether the Court may certify plaintiffs' medical monitoring claim, the Court must perforce decide what is the proper standard under Rule 23(b)(2).

As a necessary and logical beginning point, the Court turns to the actual language of Rule 23(b)(2). Rule 23(b)(2) provides that:

> b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * *
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Fed.R.Civ.P. 23(b)(2). Thus, the clear language of Rule 23(b)(2) dictates that a case may be maintained as a class action only if (1) the prerequisites of Rule 23(a) are satisfied and (2) the party

opposing the class has acted or refused to act on grounds generally applicable to the class, thus making appropriate final injunctive relief with respect to the class as a whole. This second part actually itself has two parts: (i) the action or inaction of the party opposing the class must affect the entire class seeking relief and (ii) injunctive or declaratory relief must be appropriate for the whole class.

In this case, the Court has already determined that the prerequisites of subdivision (a) have been satisfied. In addition, the Court has already held that the medical monitoring program requested by plaintiffs constitutes appropriate injunctive relief:

> Plaintiffs seek the establishment of a court-supervised program through which the class members would undergo periodic medical examinations in order to promote the early detection of diseases caused by smoking. This portion of plaintiffs' request is the paradigmatic request for injunctive relief under a medical monitoring claim.

Arch, 175 F.R.D. at 484.

Plaintiffs' revamped medical monitoring claim seeks "the establishment of a program through which the class members would undergo periodical medical examinations in order to promote the early detection of diseases caused by smoking."[3]

---

[3] Plaintiffs' reply brief contains the Supplemental Declaration of David Burns, M.D., which specifically details the medical monitoring program requested by plaintiffs. Defendants ask this Court not to consider this affidavit because it is untimely, improperly sets forth legal conclusions, and does nothing to advance plaintiffs' class certification argument. The Court rejects these arguments. To begin,

(continued)

(Pls.' Second Amended Compl. ¶ 8). This program, of course, would be court-supervised.[4] Additionally, and most importantly, plaintiffs no longer seek treatment under this program; the program is strictly limited to the types of relief that would qualify as injunctive in nature. Thus, plaintiffs' claim cannot be characterized as seeking predominantly compensatory damages. Based on the nature of the medical monitoring program requested by plaintiffs, the Court finds that plaintiffs have requested a medical monitoring program which would constitute appropriate injunctive relief if ordered. T his finding is consistent with the Court's

---

[3] (continued)

the Court will consider the supplemental declaration because defendants cannot demonstrate any prejudice. Defendants do not claim that their experts will be prejudiced in preparing for trial by having Dr. Burns' supplemental declaration supplied on July 30, 1997. Additionally, defendants were able to take the deposition of Dr. Burns on August 6, 1997, where they had the opportunity to question him about this supplemental report. Because defendants cannot demonstrate that they will suffer any prejudice by this Court's consideration of Dr. Burns' declaration or that plaintiffs somehow acted in bad faith, the Court will consider Dr. Burns' supplemental declaration.

The Court also rejects defendants' argument that Dr. Burns is expressing a "legal conclusion" in his declaration. In his declaration, Dr. Burns merely states medical conclusions which are within his purview as a medical expert. The mere fact that a medical standard is set forth in a judicial opinion does not make it a legal conclusion. With respect to defendants' final argument that Dr. Burns' declaration does not further plaintiffs' position, the Court will entertain this issue when, and if, it arises.

[4] Plaintiffs reasonably suggest that pursuant to Fed.R.Civ.P. 53, the Court may appoint a special master to oversee the medical monitoring program, and report to the Court, if the Court deems that an appropriate procedure.

prior opinion and with the opinions of other courts. Arch, 175 F.R.D. at 482-84; see also German v. Federal Home Loan Mortgage Corp., 885 F.Supp. 537 (S.D.N.Y.1995); Day v. NLO, Inc., 144 F.R.D. 330 (S.D.Ohio 1992), vacated on other grounds, In re NLO, Inc., 5 F.3d 154 (6th Cir.1993); Cook v. Rockwell Int'l Corp., 778 F.Supp. 512 (D.Colo.1991); Yslava v. Hughes Aircraft Co., 845 F.Supp. 705, 713 (D.Ariz.1993). In sum, the Court finds that the injunctive relief requested—medical monitoring for latent diseases—is appropriate with respect to the class as a whole.

The final requirement under Rule 23(b)(2) requires the named plaintiffs to demonstrate that defendants have acted or refused to act on grounds generally applicable to the class, i.e., that the action or inaction of the party opposing the class must affect the entire class seeking relief. Fed.R.Civ.P. 23(b)(2). Although defendants do not explicitly argue that plaintiffs have not satisfied this requirement, a thorough examination of defendants' arguments indicate that defendants implicitly contend that plaintiffs cannot satisfy this requirement of Rule 23(b)(2). Defendants argue that Rule 23(b)(2) certification is not proper here because the proposed class is not cohesive in nature. Defendants contend that the individual liability issues and manageability problems which are implicated by the facts of this case demonstrate that the proposed class is not cohesive in nature, and thus not eligible for certification under Rule 23(b)(2).

In response, plaintiffs first argue that defendants have attempted to improperly conflate Rule 23(b)(3)'s "predominance" requirement with Rule 23(b)(2)'s requirement that the relief be injunctive in nature. This particular argument by plaintiffs is lacking in merit. Nowhere in defendants' submissions do the defendants argue that plaintiffs' case cannot be certified under Rule 23(b)(2) because individual issues predomi-

nate over common issues. Rather, defendants merely argue that plaintiffs cannot satisfy the requirements of Rule 23(b)(2) because the proposed class is not cohesive and is beset with individual liability issues and manageability problems. Thus, the Court rejects plaintiffs' argument that defendants improperly conflate Rule 23(b)(3)'s predominance requirement with the requirements of Rule 23(b)(2).

Instead of concluding that defendants have improperly characterized Rule 23(b)(2)'s standard, the Court finds that defendants have properly identified and addressed issues which are inherently part of Rule 23(b)(2)'s standard. In Wetzel, the Third Circuit emphasized that the essential characteristic of a 23(b)(2) class is that it is "cohesive as to those claims tried in the class action." Wetzel, 508 F.2d at 248. "This homogeneity requirement is a natural consequence of the (b)(2) condition that the defendant 'has acted or refused to act on grounds generally applicable to the class....' " Santiago v. City of Philadelphia, 72 F.R.D. 619, 627 (E.D.Pa.1976). Thus, when a court determines whether the defendant "has acted or refused to act on grounds generally applicable to the class," the court is perforce examining whether the class is cohesive in nature. It is because of the cohesive or homogeneous nature of a (b)(2) class that "Rule 23(c)(3)[5] contemplates that all members of the class will be

---

[5] Rule 23(c)(3) provides:

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class. Fed.R.Civ.P. 23(c)(3).

bound." Wetzel, 508 F.2d at 249 (citation omitted). "Any resultant unfairness to the members of a [(b)(2)] class is thought to be outweighed by the purposes behind class actions: eliminating the possibility of repetitious litigation and providing small claimants with a means of obtaining redress for claims too small to justify individual litigation." Id.

To ensure that (b)(2) classes are cohesive in nature, the Third Circuit has explicitly "committed to the district court the discretion to deny certification in Rule 23(b)(2) cases in the presence of 'disparate factual circumstances.' " Geraghty v. United States Parole Commission, 719 F.2d 1199, 1205 (3d Cir.1983) (citing Carter v. Butz, 479 F.2d 1084, 1089 (3d Cir.1973)). In Santiago, the court held that "court[s] should be more hesitant in accepting a (b)(2) suit which contains significant individual issues than it would under subsection 23(b)(3)." Santiago, 72 F.R.D. at 628; see also Society for Individual Rights, Inc. v. Hampton, 528 F.2d 905, 906, aff'd in part, 528 F.2d 905 (9th Cir.1975); Rice v. City of Philadelphia, 66 F.R.D. 17, 20 (E.D.Pa.1974) (holding that a case should not proceed as a (b)(2) action where "virtually all of the issues would have to be litigated individually in order to determine whether a particular alleged class member was entitled to any damages at all").

The Santiago court identified two reasons as to why courts must necessarily determine whether a putative (b)(2) class action implicates individual issues. First, the court noted that in a (b)(2) action, unnamed members, who are bound by the action without the opportunity to withdraw, "with valid individual claims may be prejudiced by a negative decision on the class action." Thus, the court must ensure that significant individual issues do not pervade the entire action because it would be highly unjust to bind absent class members to a negative decision where

the class representatives' claims present strikingly different individual issues then the absent members. Second, the Santiago court noted that "the suit could become unmanageable and little value would be gained in proceeding as a class action ... if significant individual issues were to arise consistently." Id.

In light of this precedent, the language of Rule 23(b)(2) itself and the purposes behind Rule 23(b)(2), this Court concludes that it is required to examine whether the proposed class herein implicates too many individual issues and manageability problems to be certified under Rule 23(b)(2). This inquiry perforce flows from Rule 23(b)(3)'s essential characteristic that a (b)(2) class is cohesive in nature, and this cohesive/homogeneity requirement is "a natural consequence of the (b)(2) condition that the defendant 'has acted or refused to act on grounds generally applicable to the class.' " Id. at 627. Indeed, as a matter of common sense, a court simply could not allow a case with significant individual issues to be certified under (b)(2). A (b)(2) class action with many individual issues would quickly degenerate into separate and distinct mini-trials, thus defeating the original purposes for class certification.

Thus, the question posited at this point in the Court's Rule 23(b)(2) analysis is whether this action raises so many individual issues that certification cannot be granted. In this regard, defendants set forth a host of individual issues that will purportedly arise in this action and thus necessarily preclude certification. Defendants argue that plaintiffs medical monitoring claim depends overwhelmingly on individual, not common issues, that their affirmative defenses raises numerous individual issues, and that plaintiffs' proposed Rule 23(b)(2) class is unmanageable and raises fairness and due process concerns. In response, plaintiffs set forth a number of arguments, including the arguments that defendants improperly argue the merits of the

case in the context of a Rule 23 dispute, that the individual issues defendants refer to simply do not exist, and that even if the individual issues existed, they do not preclude (b)(2) certification.

Before this Court determines whether individual issues preclude certification under (b)(2), the Court notes that it is charged with the obligation to walk a thin line between the prohibition against examining the merits of the case and the obligation to examine the claims, defenses, relevant facts and applicable substantive law to make a determination of the certification issues presented herein. In Eisen, the Supreme Court explicitly warned that a court considering class certification may not conduct a preliminary inquiry into the merits of a suit. See Eisen, 417 U.S. at 177-78, 94 S.Ct. at 2152-53. Nonetheless, the Supreme Court has also instructed that a court may look beyond the pleadings to determine whether the requirements of Rule 23 have been sat isfied. See General Tel. Co. v. Falcon, 457 U.S. 147, 157 n. 13, 102 S.Ct. 2364, 2370 n. 13, 72 L.Ed.2d 740 (1982) ("Sometimes the issues are plain enough from the pleading ... and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question."); Coopers & Lybrand v. Livesay, 437 U.S. 463, 469, 98 S.Ct. 2454, 2458, 57 L.Ed.2d 351 (1978) (explaining that "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action' "). Therefore, this Court must attempt to strike the fine balance between permissibly identifying the issues that the case will present for purposes of determining whether the requirements of Rule 23 have been met and impermissibly deciding those issues on the merits.

Defendants first argue that this action cannot be certified under (b)(2) because plaintiffs' medical monitoring claim depends on overwhelming individual issues, not common issues.

Providing this Court with fortuitous guidance, the Pennsylvania Supreme Court recently held that a plaintiff bringing an individual monitoring claim must prove the following elements to prevail:

> (1) exposure greater than normal background levels; (2) of a proven hazardous substance; (3) caused by the defendant's negligence; (4) as a proximate result of the exposure, plaintiff has a significantly increased risk of contacting a serious latent disease; (5) a monitoring procedure exists that makes the early detection of the disease possible; (6) the prescribed monitoring regime is different from that normally recommended in the absence of exposure; and (7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles.

Redland Soccer Club, Inc. v. Department of the Army, 548 Pa. 178, 696 A.2d 137, 145-46 (1997). It is these elements that named plaintiffs will have to prove at trial in order to be entitled to relief under Pennsylvania's medical monitoring law.

Defendants argue that proof of these elements must proceed on an individual- by-individual basis, and thus this case cannot be tried on a class-wide basis. In advancing this argument, defendants rely heavily on this Court's June 3, 1997 opinion, arguing that this Court has already determined that proof of these elements must proceed on an individual-by-individual basis. Defendants claim that this Court's prior findings are the law of the case, and as such, the parties are bound by these findings.

Although this Court did make certain findings in its June 3, 1997 opinion, the posture of this case has radically changed since that opinion. Since the June 3, 1997 opinion, plaintiffs have

amended their complaint, dropping all claims except for their medical monitoring claim and amending their factual averments. Consequently, many of the Court's findings in its June 3, 1997 opinion simply would not apply to the determination of the instant dispute. Further, the Court's findings with respect to the individual issues that could arise under plaintiffs' medical monitoring claim were based solely on the facts, circumstances and arguments that were before the Court at that time. Indeed, in the Court's medical monitoring discussion, the Court simply stated that "it appears that these issues cannot be resolved on a class-wide basis." Arch, 175 F.R.D. at 490 (emphasis added). From this language, it is clear that this Court's opinion was based merely on the issues, facts and circumstances that were before it at the time of plaintiffs' first motion for class certification. Because of the changed circumstances of this case, which was brought on by plaintiffs' amendment and new evidence introduced to the Court, the Court concludes that it is not perforce bound by the prior findings in its June 3, 1997 opinion.[6] With this stated, the Courts turns to the issues sub judice.

Defendants primarily argue that element number six of plaintiffs' medical monitoring claim raises an issue that can only be proven on an individual-by- individual basis. Element six provides that a plaintiff asserting a medical monitoring claim must prove that "the prescribed monitoring regime is different from that normally recommended in the absence of the exposure." Redland, 696 A.2d at 146. This element mirrors the Third Circuit's requirement "whether a reasonable physician would

---

[6] This conclusion, however, does not preclude the Court from finding that certain issues should be treated as the law of the case. If the facts and circumstances upon which those findings were based remain unchanged, then the Court will surely give those findings their proper binding effect.

prescribe for [the plaintiff] a monitoring regime different than the one that would have been prescribed in the absence of that particular exposure." In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 788 n. 53 (3d Cir.1994). In this Court's June 3, 1997 opinion, the Court held that "it appear[ed] that [this] issue cannot be resolved on a class-wide basis." Arch, 175 F.R.D. at 490. Based on this prior finding, defendants argue that this Court has already determined that this prior issue would preclude certification of a (b)(2) class.

This finding, however, was made in the absence of any evidence by plaintiffs that this issue could be proved on a class-wide basis. Indeed, plaintiffs currently argue that this issue can be proved on a class-wide basis. Plaintiffs plan to offer the testimony of Dr. Burns that "it is not necessary to examine each plaintiffs' medical records in order to construct or administer this [medical monitoring] program." (Pls.' Reply Mem. at 10). Plaintiffs specifically argue that Dr. Burns will testify that if a smoker has other risk factors towards one of the diseases caused by smoking, then medical monitoring due to his smoking behavior will be all the more urgent. In sum, plaintiffs argue that the " 'reasonable physician' criteria will be the subject of expert proof at trial, on a class-wide basis." (Pls.' Resp. to Defs.' Sur Reply at 11).

In light of this class-wide evidence that purportedly will be presented at trial by plaintiffs, the Court cannot conclude that element six of plaintiffs' medical monitoring claim definitively raises significant individual issues that preclude certification under (b)(2). Although defendants' position—that plaintiffs cannot meet the "reasonable physician" criteria on a class-wide basis—may ultimately prove to be correct, the Court cannot properly decide this issue at this stage of the litigation. See Eisen, 417 U.S. at 177-78, 94 S.Ct. at 2152-53. In light of Dr. Burns' proposed testimony, the Court would be impermissibly examin-

ing the merits of plaintiffs' claim, if it decided at this point that plaintiffs cannot prove element six of their medical monitoring claim on a class-wide basis. Further, this issue will undoubtedly be visited at the dispositive motion stage, and because a court's certification order can always be amended at any point in the litigation, see Asbestos Litigation, 789 F.2d at 1011, the Court can always vacate any certification order that may be granted if it finds, after ruling on the parties' dispositive motions, that individual issues actually preclude litigating this case on a class-wide basis.

Defendants further contend that plaintiffs' claim—that plaintiffs are addicted to cigarettes—raises a host of innumerable individual questions that preclude certification. In support of this contention, defendants point to this Court's June 3, 1997 opinion, wherein the Court quoted an expert who stated that "the assessment of addiction is an inherently individual inquiry." Arch, 175 F.R.D. at 487. Based on this observation, the Court found that this one individual issue—the assessment of addiction for each and every class member—precluded certification under Rule 23(b)(3). This reasoning clearly would apply to the present dispute and would preclude certification under (b)(2), if proving addiction was central to plaintiffs' current claim of medical monitoring.

However, plaintiffs now represent to the Court that under their Second Amended Complaint, addiction is only part of their case to the extent that "the addictive properties of nicotine are relevant ... to show the design defect of the product." (Pls.' Resp. Defs.' Sur Reply at 9). Plaintiffs contend that they will introduce class-wide expert evidence to prove that when cigarettes are used exactly as they are intended to be used: (1) that the vast majority of those who use cigarettes become addicted and (2) that cigarettes are the leading cause in the nation of cardiovascular

disease, lung cancer, and chronic obstructive pulmonary disease, due to the exposure of the throat, heart and lungs to tobacco smoke. Under plaintiffs' Second Amended Complaint, plaintiffs will only refer to the addictive properties of nicotine to the extent that they will attempt to prove that cigarettes are defectively designed due to the hazardous substances contained in cigarettes and the allegation that cigarettes addict the vast majority of smokers. Based on plaintiffs' present position, plaintiffs will not attempt to show, as they were attempting to do under the First Amended Complaint, that plaintiffs' smoking was involuntary because of addiction. Thus, defendants' argument—that the assessment of addiction would raise individual issues—is not implicated under the facts of the new complaint, and thus does not preclude certification.

Defendants further argue that the individual defenses raised by the facts of this case preclude certification under Rule 23(b)(2). Defendants specifically argue that the defenses of assumption of risk, statute of limitations, consent and comparative negligence raise individual issues which cannot be properly or fairly tried on a class-wide basis. In this Court's June 3, 1997 opinion, the Court held that affirmative defenses would implicate numerous issues which it appeared could only be tried on an indiv idual-by- individual basis. However, in its June 3, 1997 opinion, the Court did not fully address plaintiffs' argument that these affirmative defenses were not available on the record. The Court did not address this argument because "even if the Court [had] ruled that defendants were barred from raising one or all of its affirmative defenses, there [were] numerous remaining individual issues which predominate[d] over common issues." Arch, 175 F.R.D. at 492. Thus, this question is still before the Court, but is now being raised in a Rule 23(b)(2) context as opposed to a Rule 23(b)(3) context.

A decision as to whether defendants can raise none, some

or all of their proposed affirmative defenses will greatly further this Court's determination as to whether individual issues preclude certification under Rule 23(b)(2). If the Court were to find that some or all of these defenses could be raised by defendants, then the certification of plaintiffs' proposed class would be in grave jeopardy. On the other hand, this issue would be completely moot if the Court were to determine that based on the record of the case, defendants could not raise any of the proposed affirmative defenses.

However, to determine whether affirmative defenses are available in this case, the Court necessarily will have to inquire into and decide, at least partially, the merits of this case. This the Court cannot do. See Eisen, 417 U.S. at 177-78, 94 S.Ct. at 2152-53; see also In re Revco Secs. Litig., 142 F.R.D. 659, 663-64 (N.D.Ohio 1992). It will only be after the Court addresses the issues of affirmative defenses in the dispositive motion context that the Court will be in a position to determine whether, upon the record of the case as construed in the light of plaintiffs' Second Amended Complaint, affirmative defenses will raise so many individual issues that certification is not possible. Thus, for the purposes of the instant motion, the Court will not consider whether the speculative individual issues raised by defendants' proposed affirmative defenses preclude (b)(2) certification.[7]

---

[7] In their Second Amended Complaint, plaintiffs alternatively plead the negligence, intentional or strict liability standards in support of their medical monitoring claim. Referring to Redland, defendants argue that the intentional tort and strict liability theories are not proper bases for a medical monitoring claim. Despite this dispute, the Court will not consider at this stage in the litigation whether plaintiffs can state a claim for medical monitoring based on strict liability and intentional tort theories because such an examination would be an impermissible inquiry into the merits of plaintiffs' claim. Eisen, 417 U.S. at 177-78, 94 S.Ct. at 2152-53.

Based on the foregoing observations and analysis, the Court finds that defendants simply have not raised any concrete individual issues which would preclude certification of plaintiffs' proposed class under Rule 23(b)(2) at this point in time. Clearly, plaintiffs have identified many individual issues which may be implicated by the record of this case. Whether these individual issues exist or not, and thus preclude certification, cannot be determined at this stage in the litigation without impermissibly inquiring into the merits of plaintiffs' claim or defendants' affirmative defenses. Thus, defendants cannot properly argue that certification cannot be granted under subdivision (b)(2) because of the individual issues implicated by plaintiffs' Second Amended Complaint.

The Court also rejects defendants' argument that the proposed class cannot be certified because the class is unmanageable and defendants' constitutional rights would be prejudiced. The Third Circuit has stated that:

> Before a ruling is made denying class action certification on unmanageability grounds, hard data should be presented to the district court as to the actual difficulty or ease in ... managing the proceedings.

Neely v. United States, 546 F.2d 1059, 1071 (3d Cir. 1976). Because defendants, at this time, have been unable to demonstrate the existence of any concrete individual issues that will be encountered in this litigation, defendants' manageability argument must fail because it was based on defendants being able to show that individual issues would make this litigation unmanageable.

The Court similarly finds defendants' constitutional rights argument unavailing. Defendants baldly claim that their Seventh

Amendment rights will be violated if two juries are allowed to pass over the same issues twice. However, defendants do not specifically cite which issues, in light of plaintiffs' Second Amended Complaint, would be passed over twice by two separate juries. Thus, defendants have not presented this Court with any information upon which it can make a determination as to whether defendants' Seventh Amendment rights could be violated.

In addition, plaintiffs contend that defendants' constitutional rights will not be implicated in this case because this case will be tried to the Court, non-jury. As such, plaintiffs assert that the Court can phase or sequence the presentation of evidence, as frequently occurs in bench trial proceedings, thus avoiding any bifurcation problems. The Court will not decide at this point whether plaintiffs are correct in their position; instead, the Court merely sets forth plaintiffs' position to demonstrate that defendants' concerns are not supported by the record of the case and that defendants have not fully considered the procedural mechanisms which can be used at trial in this case to protect their rights in a class action.

Because defendants have been unable to demonstrate at this point in time that this case is beset with individual issues and manageability problems, the Court finds that plaintiffs' proposed case has the cohesiveness to survive as a Rule 23(b)(2) class. Plaintiffs allege that defendants, acting in concert or pursuant to a common design, have engaged in tortious conduct directed toward the entire class as a whole. Whether or not plaintiffs can prove that defendants have acted in concert or pursuant to a common design is not a proper question to be resolved in a certification motion, rather this merit-based question must be reserved for later proceedings. See Eisen, 417 U.S. at 178, 94 S.Ct. at 2153. However, for the purposes of the instant issue sub judice, it is highly relevant that plaintiffs have alleged

that defendants have acted in concert or pursuant to a common design. It is this allegation of concerted conduct that supports a finding that defendants have acted on grounds generally applicable to all members of plaintiffs' class. Although there may be individual variations with respect to each class members' relationship with the defendants, the common questions of defendants' liability, which are intimately connected with their concerted conduct, support a finding that defendants have acted on grounds generally applicable to all members of the proposed class.

Because the Court finds that all of the requirements of Rule 23(b)(2) have been satisfied, the following class is certified as a Rule 23(b)(2) class:

> All current residents of Pennsylvania who are cigarette smokers as of December 1, 1996, and who began smoking before age 19, while they were residents of Pennsylvania.

Because a court may amend an order granting class certification, Asbestos Litigation, 789 F.2d at 1011, in a close case the court should rule in favor of class certification. Kahan, 424 F.2d at 169. Thus, even though this case may present a close question as to whether this action should be certified under Rule 23(b)(2), the Court will grant certification because the Court may amend the certification order before a decision on the merits, if it becomes obvious after resolution of the parties' dispositive motions that too many individual issues are implicated by the facts of this case.

III. Conclusion

Accordingly, for the foregoing reasons, plaintiffs' re-

newed motion for certification of medical monitoring class pursuant to Fed.R.Civ.P. 23(b)(2) is hereby granted.

An appropriate Order follows.

ORDER

AND NOW, this 22nd day of August, 1997, upon consideration of plaintiffs' Renewed Motion for Certification of Medical Monitoring Class Pursuant to Fed.R.Civ.P. 23(b)(2), and defendants' response thereto, and plaintiffs' reply thereto, and defendants' sur reply thereto, and plaintiffs' response to defendants' sur reply thereto, and the various exhibits in support of the aforementioned, it is hereby ORDERED that said Motion is GRANTED.

IT IS FURTHER ORDERED that the following class is CERTIFIED pursuant to Federal Rule of Civil Procedure 23(b)(2):

> All current residents of Pennsylvania who are cigarette smokers as of December 1, 1996, and who began smoking before age 19, while they were residents of Pennsylvania.

AND IT IS SO ORDERED.

MEMORANDUM ON MOTION

Presently before this Court are Defendants' Motion for Certification of Class Certification Order of August 22, 1997, for Interlocutory Appeal and for a Stay of Proceedings Pursuant to 28 U.S.C. § 1292(b) or, in the Alternative, for Reconsideration of the August 22, 1997 Order, and plaintiffs' response thereto, and defendants' reply thereto. For the following reasons, the

Court will deny defendants' Motion. Pursuant to Federal Rule of Civil Procedure 23(c)(1), the Court will decertify the class that had been previously certified by Order dated August 22, 1997, it appearing that this action cannot proceed on a class-wide basis.

I. Introduction

By Memorandum and Order dated August 22, 1997, this Court certified this case as a class action, pursuant to Federal Rule of Civil Procedure 23(b)(2), against thirteen defendants,[1] wherein named plaintiffs[2] seek the establishment of a medical monitoring program on behalf of over one million class members. Because named plaintiffs satisfied the threshold requirements of Rule 23(a)(1)-(4) and the requirements of Rule 23(b)(2), this Court certified the following class:

---

[1] The defendants are The American Tobacco Company, Inc., R.J. Reynolds Tobacco Company, RJR Nabisco, Inc., Brown & Williamson Tobacco Corporation, Philip Morris, Inc., Philip Morris Companies, Inc., Lorillard Tobacco Company, Inc., Lorillard, Inc., United States Tobacco Company, The Tobacco Institute, Inc., The Council for Tobacco Research-U.S.A., Inc., Liggett Group, Inc., Liggett & Myers, Inc. and Brooke Group, Ltd. Pursuant to the respective parties' stipulations, American Brands, Inc., Batus, Inc., Batus Holdings, Inc., Loews Corporation and UST, Inc. have been dismissed from this action without prejudice. In addition, B.A.T. Industries p.l.c. was dismissed for lack of personal jurisdiction.

[2] The plaintiffs named in the Second Amended Complaint are William Barnes, Ciaran McNally, Catherine Potts, Norma Rodweller, Barbara Salzman and Edwark J. Slivak. Steven Arch was granted leave to withdraw from this action and his claims were dismissed without prejudice.

> All current residents of Pennsylvania who are cigarette smokers as of December 1, 1996, and who began smoking before age 19, while they were residents of Pennsylvania.

In the August 22, 1997 Order, this Court explained that the issue of class certification was a "close question." Specifically, the Court explained:

> Because a court may amend an order granting class certification, Asbestos Litigation, 789 F.2d at 1011, in a close case the court should rule in favor of class certification. Kahan, 424 F.2d at 169. Thus, even though this case may present a close question as to whether this action should be certified under Rule 23(b)(2), the Court will grant certification because the Court may amend the certification order before a decision on the merits, if it becomes obvious after resolution of the parties' dispositive motions that too many individual issues are implicated by the facts of this case.

Barnes v. American Tobacco Co., 1997 WL 550650, at *15, 176 F.R.D. 474, —— (E.D.Pa.1997). Even though the Court concluded that class certification presented a close question, the class was certified because, on the record before the Court at the time, plaintiffs had satisfied requirements of Rule 23.

Defendants presently move for certification of this Court's August 22, 1997 Order for interlocutory appeal and for a stay of proceedings pursuant to 28 U.S.C. § 1292(b) or, in the alternative, for reconsideration of the August 22, 1997 Order. Defendants contend that immediate interlocutory appeal is warranted in this case because the August 22, 1997 Order involves (1) a controlling question of law as to which there is a substantial

ground for difference in opinion and (2) immediate appeal would "materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

Defendants contend that this case involves several controlling questions of law as to which there is a substantial difference of opinion: (1) Did the Court, contrary to Georgine v. Amchen Products, Inc., 83 F.3d 610 (3d Cir.1996) and other well-established precedents, certify a class without due consideration of the individual issue that pervade the case?; (2) Did the Court improperly interpret Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177- 78, 94 S.Ct. 2140, 2152-53, 40 L.Ed.2d 732 (1974) and impermissibly shift the burden of proof on class certification requirements to defendants?; (3) Did the Court's Eisen analysis and burden shifting result in the improper certification of this class action?; (4) Did the Court err in certifying an immature tort for class certification?

Defendants also maintain that interlocutory review of these questions will materially advance this litigation. Defendants claim that this Court and the parties presently face the daunting task of litigating dozens of issues implicating decades of conduct by at least six cigarette manufacturers and other defendants concerning hundreds of products. See Arch v. American Tobacco Co., Inc., 175 F.R.D. at 488-89 (E.D.Pa.1997). If the Court has erred in certifying this class action, defendants argue that much time, effort and expense will be wasted before an appeal can be taken after final judgment. Defendants, thus, submit that interlocutory review will materially advance this litigation.

In their motion for reconsideration, defendants merely incorporate the same arguments that they advance in their motion for interlocutory appeal. Plaintiffs, of course, have filed a response, in which they claim that neither the motion for interlocu-

tory appeal nor the motion for reconsideration should be granted. Plaintiffs argue that there simply exists no controlling question of law, only a difference of opinion. Further, plaintiffs submit that interlocutory review in this case will not materially advance this litigation in light of the fact that trial is only a few weeks away. With respect to the reconsideration motion, plaintiffs argue that such motion should be denied because defendants have not raised any grounds which are cognizable in a motion to reconsider.

The Court will address these issues below. In addition to disposing of defendants' motions, the Court will also consider, pursuant to Fed.R.Civ.P. 23(c)(1), whether this action can proceed as a class action in light of the evidentiary record and the issues which are now before the Court.

II. Discussion

The Court will first address whether the August 22, 1997 Order should be certified for interlocutory appeal or whether defendants' alternative motion for reconsideration should be granted. The Court will then consider whether this case can proceed as a class action in light of individual issues that have been implicated by the evidentiary record presently before the Court.

A. Interlocutory Appeal

Interlocutory review is only warranted under exceptional circumstances. Appellate review of a district court order is restricted to final decisions to prevent "the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequences, but a single controversy." Eisen, 417 U.S. at 170, 94 S.Ct. at 2149. The policy is clearly against punctuating ongoing litigation with serial ap-

peals. United States v. Hollywood Motor Car Co., 458 U.S. 263, 265, 102 S.Ct. 3081, 3082-83, 73 L.Ed.2d 754 (1982).

Interim review of class certification orders is even less appropriate, given the discretionary and conditional nature of Rule 23 decisions. For this reason, the Third Circuit has held that the district court's determination to permit a class action does not itself present a controlling question of law. Link v. Mercedes-Benz of North Am., Inc., 550 F.2d 860, 862 (3d Cir.1977). Instead, the Third Circuit requires "special factors which take it outside the ambit of the general rule." Id. (quoting Katz v. Carte Blanche Corp., 496 F.2d 747, 756 (3d Cir.1974)). Accordingly, under § 1292(b), certification of orders granting class certification "is appropriate only in 'exceptional' cases." Piazza v. Major League Baseball, 836 F.Supp. 269, 270 (E.D.Pa.1993).

Not only must defendants prove that they are entitled to interlocutory review in light these principles, defendants must show the following: (1) the existence of a controlling question of law with respect to which there are substantial grounds for difference of opinion, and (2) that an immediate appeal may materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b); see also Katz, 496 F.2d at 755. The defendants, here, cannot meet their burden under § 1292(b).

Where the purported "controlling question of law" is simply a question of proper exercise of discretion, the Third Circuit has held that interim review is inappropriate. See, e.g., Ungar v. Dunkin Donuts of Am., Inc., 531 F.2d 1211 (3d Cir.1976) ("a 'controlling question' does not exists when the sole issue is whether the factual complexity of the given case meet the class action requirements of Rule 23"). Here, defendants argue that the Court's class certification order should be certified for immediate appeal pursuant to § 1292(b) because of four pur-

ported controlling questions. Notwithstanding defendants' arguments to the contrary, the Court finds that the "questions of law" which defendants enumerate are really nothing more than disagreements with the Court's application of Rule 23 to the particular facts of this case in exercising its discretion in certifying the class. In this Circuit, such disagreements do not constitute controlling issues of law under § 1292(b) and cannot be the basis for interlocutory appeal.

Under Rule 23(b)(2), two requirements must be met before a class can be certified: (1) the requirements of Rule 23(a) must be satisfied; and (2) defendants must have acted or refused to act on grounds generally inapplicable to the class and final injunctive relief must be appropriate. Fed.R.Civ.P. 23(a), (b)(2). In Barnes (the August 22, 1997 Order), this Court found that plaintiffs had met the requirements of numerosity, commonality, typicality and adequacy. Barnes, 1997 WL 550650, at *14-15, 176 F.R.D. at ——-——. The Court also determined in Barnes that defendants have acted or refused to act on grounds generally applicable to the class and that final injunctive relief was appropriate. Id. at *7-8, 176 F.R.D. at ——-——. Thus, a fair review of this Court's previous Order demonstrates that this Court properly considered the relevant requirements under Rule 23.

Based on the record that was presented to the Court when it considered plaintiffs' renewed motion for class certification, the Court cannot find that it did not give "due consideration of the individual issues" that were involved in the case. A close review of the August 22, 1997 Order indicates that this Court carefully considered whether any individual issues existed on the record at that time. For example, at the time of this Court's August 22, 1997 Order, plaintiffs represented to this Court that "addiction" no longer played a role in this case to the extent that addiction would require an individual analysis. Moreover, plaintiffs pointed to certain conduct of defendants that would preclude

defendants from raising affirmative defenses. Thus, the hig hly individual issues of affirmative defenses were not implicated at the time of this Court's August 22, 1997 Order. In sum, the Court concludes that it properly considered the individual issues that were implicated by the record of this case at the time of entry of the August 22, 1997 Order.

The Court also finds that it did not incorrectly interpret Eisen or improperly shift the burden of proof on the class certification requirements. While defendants offer a lengthy analysis discussing the meaning of Eisen, their reading of Eisen is not supported by Eisen itself or by any subsequent Supreme Court decision addressing it; Eisen, as written, remains controlling law. In both certification decisions in this case, the Court recognized that it must look beyond the pleadings to determine whether the requirements of Rule 23 have been satisfied. Arch, 175 F.R.D. at 485- 86; Barnes, 1997 WL 550650, at *10, 176 F.R.D. at ——. The difference between the result in Arch and the result in Barnes had nothing to do with this Court's misinterpretation of E isen. To the contrary, in light of plaintiffs' Second Amended Complaint and the record that existed before the Court at the time of its decision, the Court simply was not convinced that individual issues existed which would preclude certification. In other words, plaintiffs had met their burden of proving the elements of Rule 23, and demonstrating that no individual issues existed.

Defendants' burden-shifting argument is similarly unavailing. Defendants essentially say that the Court has lost its bearing in the three months that passed since the Arch decision. By focussing on "snippets" or "bits and scraps" from the Court's opinion, defendants suggest that the Court improperly shifted the burden of proof on class certification onto defendants, i.e., that there was, in effect, a presumption in favor of certification, and that defendants had to show why the class should not be certified.

This Court, however, engaged in no such activity.

In Barnes, the Court found that plaintiffs had met their burden, and that defendants had failed to rebut plaintiffs' showing regarding common issues and class-wide proof. The Court, in Barnes, first determined that plaintiffs had met the requirements of Rule 23. The Court then turned to defendants' argument that many individual issues existed that would preclude certification. At this point in the Court's analysis, the Court did not require defendants to prove that these individual issues existed. Rather, a close review of Barnes demonstrates that the Court independently reviewed the record and simply concluded that individual issues would not preclude certification. If the Court used language in its opinion that made it appear as though it was requiring defendants to show that no individual issues existed, such language is directly contradicted by the Court's actual analysis. Accordingly, defendants' burden-shifting argument is in itself erroneous and provides no basis for interlocutory appeal.[3]

Finally, defendants cannot establish, as they must, that an interlocutory appeal "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Courts within

---

[3] The Court also rejects defendants' argument that this Court erred in certifying an immature tort for class treatment. The immature tort doctrine is a doctrine which has been used to assess whether the superiority and/or predominance prongs of Rule 23(b)(3) have been satisfied; thus the immature tort theory is necessarily tied to Rule 23(b)(3). The immature tort doctrine simply is not applicable to this Court's Rule 23(b)(2) analysis; indeed, defendants did not raise the immature tort doctrine in the Rule 23(b)(2) context until the filing of this instant motion. To the extent that it may be applicable, the Court finds that the "immature" nature of plaintiffs' medical monitoring claim would not preclude certification.

the Third Circuit have routinely held that where a case is ready for trial, an interlocutory appeal will only result in delay. See Piazza, 836 F.Supp. at 271. For instance, in Piazza, the court reached this conclusion where trial was to begin in less than five weeks. Here, where the trial is scheduled to begin in less than two weeks, the conclusion is self-evident.

Defendants have not satisfied § 1292(b)'s applicable standards. Defendants have failed to show how the Court's decision in Barnes is anything other than an appropriate exercise of discretion under Rule 23(b)(2) that comports with precedent. Second, with trial on the immediate horizon, the most expeditious course is to proceed forward, reserving all appeals for resolution thereafter. Interlocutory review will only result in substantial delay.

Because defendants have not established their right to interlocutory appeal, the Court will deny their motion seeking such relief. Having disposed of this issue, the Court will now address defendants' motion for reconsideration.

B. Motion for Reconsideration

The purpose of a motion for reconsideration, as is often stated, is to correct manifest errors of law or fact or to present newly discovered evidence. Harsco Corp. v. Zlotnicki, 779 F.2d 906, 909 (3d Cir.1985). Reconsideration is granted only if defendants can demonstrate one of three grounds: (1) the availability of new evidence; (2) an intervening change in controlling law; or (3) the need to correct a clear error of law. Smith v. City of Chester, 155 F.R.D. 95, 96-97 (E.D.Pa.1994).

In the Third Circuit, a motion for reconsideration, even where purportedly grounded on the court's commission of clear error, is not to be used merely as an opportunity to reargue issues

that the court has already analyzed and determined. Waye v. First Citizen's National Bank, 846 F.Supp. 310, 314 (M.D.Pa.1994). "[A] motion for reconsideration addresses only factual and legal matters that the Court may have overlooked.... It is improper on a motion for reconsideration to 'ask the Court to rethink what [it] had already thought through—rightly or wrongly.' " Glendon Energy Co. v. Borough of Glendon, 836 F.Supp. 1109, 1122 (E.D.Pa.1993) (citation omitted).

Applying this standard here, the Court finds that defendants are not entitled to reconsideration. As stated in Part II.A., defendants have failed to establish that this Court committed a manifest error of law in Barnes. In addition, defendants have not presented this Court with newly discovered evidence that would justify that this Court reconsider its August 22, 1997 Order. At its core, defendants' motion for reconsideration simply expresses defendants' disagreement with this Court's August 22, 1997 Or der, and asks the Court to reconsider what is has already considered in its previous Order. As defendants are aware, a motion cannot be used to reargue issues which have already been presented and rejected.

Because defendants do not advance arguments which are cognizable in a reconsideration context, the Court must deny defendants' alternative motion for reconsideration. Having disposed of defendants' motion in its entirety, the Court now turns to the issue of whether this Court should decertify plaintiffs' class pursuant to Fed.R.Civ.P. 23(c)(1).

C. Rule 23(c)(1) Reconsideration

Federal Rule of Civil Procedure 23(c)(1) provides, in part, that: "An order under this subdivision may be conditional and may be altered or amended before the decision on the

merits." Fed.R.Civ.P. 23(c)(1). Under this Rule, trial courts are permitted to decertify, in whole or in part, any class that had been previously certified if the facts before the Court require such a result. See Miera v. First Sec. Bank of Utah, N.A., 925 F.2d 1237, 1241-42 (10th Cir.1991) (holding that a trial court may decertify a class action pursuant to Rule 23(c)(1)). Indeed, district courts are required to reassess their class rulings regularly as the case develops. Kuehner v. Heckler, 778 F.2d 152, 163 (3d Cir.1985); Richardson v. Byrd, 709 F.2d 1016, 1019 (5th Cir.1983).

The Fifth Circuit has succinctly articulated the obligations of a district court under Rule 23:

> Under Rule 23 the district court is charged with the duty of monitoring its class decisions in the light of the evidentiary development of the case. The district judge must define, redefine, subclass and decertify as appropriate in response to the progression of the case from assertion to facts. We recognize that these complex cases cannot be run from the tower of the appellate court given its distinct institutional role and that is has before it printed words rather than people.

Id. Federal district courts must constantly monitor the progress of the class action cases before them; it is our obligation and duty. A trial court must define, redefine, subclass and decertify the class action before it when the evidentiary development of a case requires such action. In this regard, the Court finds that, in light of the evidentiary development of the instant case, this Court must decertify the class which had been previously certified in this action.

By Memorandum and Order dated August 22, 1997, this Court certified a class in this action, pursuant to Federal Rule of Civil Procedure 23(b)(2), against thirteen defendants, wherein named plaintiffs seek the establishment of a medical monitoring program on behalf of over one million class members. The Court, however, explained that the issue of class certification was a "close question." Specifically, the Court explained:

> Because a court may amend an order granting class certification, Asbestos Litigation, 789 F.2d at 1011, in a close case the court should rule in favor of class certification. Kahan, 424 F.2d at 169. Thus, even though this case may present a close question as to whether this action should be certified under Rule 23(b)(2), the Court will grant certification because the Court may amend the certification order before a decision on the merits, if it becomes obvious after resolution of the parties' dispositive motions that too many individual issues are implicated by the facts of this case.

Barnes, 1997 WL 550650, at *15, 176 F.R.D. at ——. Thus, in the August 22, 1997 Order, the Court specifically noted that it would eventually be required to revisit the certification issue at a later stage. Although the Court originally intended not to revisit this issue until after disposing of defendants' summary judgment motions, in light of the evidentiary record which has been produced at the summary judgment stage, the Court need not wait any longer to decide whether this action can continue on a class-wide basis.

Indeed, reviewing the evidentiary record that is now before the Court, it is obvious that this action implicates far too many individual issues to proceed on a class-wide basis. Al-

though this action has been certified under Rule 23(b)(2), it is well-established that a district court must still determine whether individual issues and manageability problems preclude certification. In Barnes, this Court, in great detail, explained the relationship between individual issues and Rule 23(b)(2) certification:

> ... In Wetzel, the Third Circuit emphasized that the essential characteristic of a 23(b)(2) class is that it is "cohesive as to those claims tried in the class action." Wetzel, 508 F.2d at 248. "This homogeneity requirement is a natural consequence of the (b)(2) condition that the defendant 'has acted or refused to act on grounds generally applicable to the class....' " Santiago v. City of Philadelphia, 72 F.R.D. 619, 627 (E.D.Pa.1976). Thus, when a court determines whether the defendant "has acted or refused to act on grounds generally applicable to the class," the court is perforce examining whether the class is cohesive in nature. It is because of the cohesive or homogeneous nature of a (b)(2) class that "Rule 23(c)(3) contemplates that all members of the class will be bound." Wetzel, 508 F.2d at 249 (citation omitted). "Any resultant unfairness to the members of a [(b)(2)] class is thought to be outweighed by the purposes behind class actions: eliminating the possibility of repetitious litigation and providing small claimants with a means of obtaining redress for claims too small to justify individual litigation." Id.
>
> To ensure that (b)(2) classes are cohesive in nature, the Third Circuit has explicitly "committed to the district court the discretion to deny certification in Rule 23(b)(2) cases in the presence of 'disparate factual circumstances.' " Geraghty v. United States

Parole Commission, 719 F.2d 1199, 1205 (3d Cir.1983) (citing Carter v. Butz, 479 F.2d 1084, 1089 (3d Cir.1973)). In Santiago, the court held that "court[s] should be more hesitant in accepting a (b)(2) suit which contains significant individual issues than it would under subsection 23(b)(3)." Santiago, 72 F.R.D. at 628; see also Society for Individual Rights, Inc. v. Hampton, 528 F.2d 905, 906, aff'd in part, 528 F.2d 905 (9th Cir.1975); Rice v. City of Philadelphia, 66 F.R.D. 17, 20 (E.D.Pa.1974) (holding that a case should not proceed as a (b)(2) action where "virtually all of the issues would have to be litigated individually in order to determine whether a particular alleged class member was entitled to any damages at all").

The Santiago court identified two reasons as to why courts must necessarily determine whether a putative (b)(2) class action implicates individual issues. First, the court noted that in a (b)(2) action, unnamed members, who are bound by the action without the opportunity to withdraw, "with valid individual claims may be prejudiced by a negative decision on the class action." Thus, the court must ensure that significant individual issues do not pervade the entire action because it would be highly unjust to bind absent class members to a negative decision where the class representatives' claims present strikingly different individual issues then the absent members. Second, the Santiago court noted that "the suit could become unmanageable and little value would be gained in proceeding as a class action ... if significant individual issues were to arise consistently." Id.

> In light of this precedent, the language of Rule 23(b)(2) itself and the purposes behind Rule 23(b)(2), this Court concludes that it is required to examine whether the proposed class herein implicates too many individual issues and manageability problems to be certified under Rule 23(b)(2). This inquiry perforce flows from Rule 23(b)(3)'s essential characteristic that a (b)(2) class is cohesive in nature, and this cohesive/homogeneity requirement is "a natural consequence of the (b)(2) condition that the defendant 'has acted or refused to act on grounds generally applicable to the class.' " Id. at 627. Indeed, as a matter of common sense, a court simply could not allow a case with significant individual issues to be certified under (b)(2). A (b)(2) class action with many individual issues would quickly degenerate into separate and distinct mini-trials, thus defeating the original purposes for class certification.

Barnes, 1997 WL 550650, at *8-9, 176 F.R.D. at —— (footnotes omitted).

Although a case may be certified under Rule 23(b)(2), which does not contain a superiority or predominance requirement, certification under (b)(2) does not relieve a court of its obligation to determine whether the existence of individual issues precludes certification. Indeed, as noted by many courts, a (b)(2) class should actually have more cohesiveness then a (b)(3) class. In this case, too many individual issues exist which prevent this case from proceeding as a class action.

To begin, the individual issue of addiction, which plaintiffs had previously represented as playing no part in this case, is

still actually part of the present case. When compelled to discuss the substantive issues in the case on defendants' motion for summary judgment, plaintiffs primarily focussed on "addiction" and purported nicotine "manipulation." (Pls.' Br. Opp'n Dfs.' Summ. J. Mots. at 1, 18-19, 29-66, 75, 139 n. 38, 159). It is obvious from plaintiffs' own words that "addiction" remains a central part of their case. As was explained in Arch, whether or not an individual is addicted is a highly individualistic inquiry:

> Plaintiffs' own expert Dr. Burns recognizes that the assessment of addiction is an inherently individual inquiry. (Burns Dep. at 64, 268). Based on this statement, defendants argue that class certification under these circumstances would require a mini-hearing on the merits of each individual's case to determine injury. See Forman v. Data Transfer, Inc., 164 F.R.D. 400, 403 (E.D.Pa.1995). Importantly, the Court finds that nowhere in plaintiffs' voluminous submissions do they actually refute that addiction is an inherently individual inquiry. Instead, plaintiffs offer a solution to this massive problem of proving addiction on an individual basis. Plaintiffs propose that once the general issue as to whether cigarettes can cause addiction is resolved, the issue as to whether each and every class member is addicted can be resolved by having them answer a questionnaire, consisting of six simple questions. Defendants rejoin that this questionnaire cannot by itself determine whether a person is nicotine dependent.
>
> The Court finds that even if the questionnaire were used to determine nicotine dependence, defendants

> would be permitted to cross-examine each and every class member as to their alleged dependence. Plaintiffs admittedly acknowledge that the plan they propose would be, at most, a prima facie indication of addiction. Plaintiffs' own experts concede that addiction is necessarily an individual inquiry. To refute plaintiffs' prima facie case, defendants would be permitted to cross-examine each individual about his specific choices, decisions and behavior, and defendants would be entitled to offer expert testimony about each person's specific circumstances and diagnosis. Based on this one individual issue, class certification under Rule 23(b)(3) is not appropriate because the cross-examination of each class member in a trial would be impossible.

Arch, 175 F.R.D. at 488 (footnotes omitted). As can be gleaned from this Court's analysis in Arch, the issue of addiction is a highly individual issue, which cannot be resolved on a class-wide basis.

Although plaintiffs had represented to this Court that they had substantially narrowed their theories of liability under the Second Amended Complaint, plaintiffs still advance the same theories that they asserted in their First Amended Complaint. Under plaintiffs' First Amended Complaint, plaintiffs asserted, among other claims, claims sounding in negligence, strict liability and intentional exposure to a hazardous substance. After plaintiffs filed their Second Amended Complaint, plaintiffs asserted only one claim—a claim for medical monitoring. Nonetheless, instead of completely dropping their claims for negligence, strict liability and intentional exposure to a hazardous substance, plaintiffs merely inserted these theories as the underlying theories of liability for their medical monitoring.

Thus, these theories, with their attendant individual issues, are still in this case.

As this Court held in Arch, these theories of liability implicate various individual issues which cannot be resolved on a class-wide basis. Indeed, this Court noted that:

> To succeed on their products liability and negligence claims, plaintiffs will also have to prove "causation," which the Court finds is not capable of determination on a class-wide basis in this case. Resolution of the "general causation" question of whether cigarettes are capable of being addictive "is not common under Rule 23(a)(2)." Kurczi v. Eli Lilly & Co., 160 F.R.D. 667, 677 (N.D.Ohio 1995). Unless it is proven that cigarettes always cause or never cause addiction, "the resolution of the general causation question accomplishes nothing for any individual plaintiff." Id.; see also In re "Agent Orange" Product Liability Litigation, 818 F.2d 145, 164 (2d Cir.1987) (the "relevant question is not whether Agent Orange has the capacity to cause harm," but rather the "highly individualistic" question of whether "it did cause harm and to whom").
>
> As explained previously, plaintiffs do not actually refute the proposition that a finding of addiction entails an individualistic inquiry; instead, they suggest that this individualistic inquiry can be proven by a questionnaire, consisting of six questions. The use, however, of this questionnaire will not obviate the need for cross-examination by defendants as demonstrated above. If plaintiffs are unable to prove that cigarettes always cause addiction (a con-

tention that plaintiffs do not advance), the Court is faced with the impossible reality of trying a case in which one million persons would have to be cross-examined as to causation.

Plaintiffs cannot satisfy the "causation" element of these claims by proving that all cigarettes can potentially cause the user to become addicted. This is a general causation issue. The resolution of this "general causation question" would accomplish nothing for any of the individual plaintiffs. See Kurczi, 160 F.R.D. at 677. Indeed, the jury would still be required to determine for each class member whether he or she is addicted to cigarettes, and, if so, whether defendants (and which defendant) caused that addiction. With respect to causation, the Court finds that this issue is highly individualized and does not lend itself to Rule 23(b)(2) certification.

To establish their strict products liability claim, plaintiffs will be required to prove a defect in defendants' products. This inquiry is also highly individualized. Defendants manufactured hundreds of different types of cigarettes over the years and have even made changes within each brand. In their First Amended Complaint, plaintiffs allege that defendants' cigarettes contain numerous "hazardous substances," and that defendants have "intentionally manipulated" the levels of nicotine and "other toxic substances." (First Amended Compl. ¶¶ 10, 13). The different types of unspecified defects—which may be present in some cigarettes but not in others—make proof of a defect a non-common issue. As a result, each class member will have to establish that

> the type of cigarettes he or she smoked contained a defect at the time he or she smoked them. See In re American Medical Systems, 75 F.3d at 1081 (commonality not established where the plaintiffs' "claims of strict liability ... will differ upon the model and the year it was issued"). The need to prove a defect in defendants' products raises another individual issue.
>
> Plaintiffs claim that they can prove a common defect on a class-wide basis for all of defendants' products. Plaintiffs argue that all of defendants' products are inherently defective because they contain sufficient levels of nicotine to cause addiction and other hazardous substances. Thus, plaintiffs will attempt to establish a common defect by showing that this combination exists in all of the cigarettes sold by defendants. Nonetheless, the possibility that plaintiffs' common defect theory will fail and that the class will be splintered into various subclasses—creating manageability concerns—"weighs against a finding of predominance of common issues." Harding v. Tambrands, 165 F.R.D. 623, 630 (D.Kan.1996) (refusing to certify strict liability class where it is possible that the plaintiffs' common defect theory could fail).

Arch, 175 F.R.D. at 488-89 (footnotes omitted). Because plaintiffs intend to prove their medical monitoring claim by using the theories of negligence and strict liability, the individual issues which are implicated by these theories still exist, and thus preclude class certification.

Turning to the issues of affirmative defenses and statute of limitations, the Court rejects plaintiffs' argument that these defenses are not available to defendants on the record. In the Arch opinion, it was explained, in some detail, that the issues of affirmative defenses and statute of limitations perforce raise numerous individual issues. Id. at *19-20. In Barnes, plaintiffs advanced the argument that these defenses were simply not available on the record as reflected by the Second Amended Complaint. Thus, the Court found that these issues necessarily did not preclude certification. Barnes, 1997 WL 550650, at *13. However, upon review of the summary judgment record, the Court finds that defendants should not be barred from raising affirmative defenses and the statute of limitations. Although the Court reaches that conclusion now, the Court will explain its reasoning in much greater detail in a memorandum opinion disposing of defendants' summary judgment motions, which will shortly follow the issuance of this opinion.

However, for the purposes of this memorandum, it is only important to note that affirmative defenses and the statute of limitations are available to defendants. As explained in Arch, the affirmative defenses and the statute of limitations perforce raise individual issues. Arch, 175 F.R.D. at 485- 86. For example, the defense of assumption of risk requires this Court to examine whether each and every plaintiff was subjectively aware of the risk and/or danger. Id. at 485. In determining whether the statute of limitations precludes a plaintiff from suing on his claim, the Court necessarily would have to examine when plaintiff's injury accrued, and whether plaintiff knew or should have known of the injury and its cause. This is clearly an individual issue.[4] The individual issues that are involved in

---

[4] It is also noted that the facts of this case implicate the individual issues of "consent" to an intentional tort and "comparative negligence." Two more issues which require individual analysis

determining whether affirmative defenses and the statute of limitations apply to each and every plaintiff are staggering. These issues clearly preclude certification.

In sum, the Court finds that the individual issues implicated by the facts and circumstances of this case preclude continuing this case as a class action. When the Court looks down the road to determine how this case would be tried, it is obvious that the litigation is unmanageable as a class action and would ultimately splinter into individual issues, which would have to be tried separately.

Hence, the Court will exercise its discretionary powers under Federal Rule of Civil Procedure 23(c)(1) and will decertify the class that had been previously certified by the August 22, 1997 Order. In light of the evidentiary record that is presently before the Court, it is plain as day that this case cannot proceed as a class action.

III. Conclusion

Accordingly, for the foregoing reasons, this Court will deny defendants' motion for certification of class certification Order of August 22, 1997, for interlocutory appeal and for a stay of proceedings pursuant to 28 U.S.C. § 1292(b) or, in the alternative, for reconsideration of the August 22, 1997 Order. However, pursuant to Fed.R.Civ.P. 23(c)(1), the Court will decertify the class that had been certified by Order dated August 22, 1997, it appearing that this case cannot proceed as a class action.